CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5134

Heard in Calgary, January 14, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADIAN RAILWAY CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer Cordell Gruning, of Medicine Hat AB.

JOINT STATEMENT OF ISSUE:

Following an investigation, Locomotive Engineer Gruning was dismissed on March 25, 2024, for the following reasons:

"Please be advised that you have been DISMISSED from Company Service for the following reason(s):

A formal investigation was conducted on March 7, 2024, in connection with "your tour of duty on train C23-01 March 1st, 2024, more specifically the events surrounding your alleged failure to perform a passing train inspection of train 149-28, and subsequent conversation with Road Foreman Evan Deadlock on March 1st, 2024, at Bowell."

At the conclusion of the investigation, your culpability was established with your failure to perform a passing train inspection of train 149-28 on March 1, 2024 while working as a Locomotive Engineer in Medicine Hat, AB.

A violation of the following:

- Rule Book for Train & Engine Employees, Section 2, Item 2.1 & 2.2
- Rule Book for Train & Engine Employees, Section 11, Item 11.7
- Train & Engine Safety Rule Book, T-0
- System Revision Document Effective October 1, 2022 and CROR Rule 109."

UNION'S POSITION:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union asserts that the ultimate penalty of dismissal in this instance is extreme and entirely excessive. Past arbitral jurisprudence maintains that the discipline for failing a passing train inspection should be in the range of demerits up to a suspension that could be as lofty as 10-20 days. The Union asserts that there was no aggravating accident or incident that might warrant such extreme punishment. The Union submits that this is an isolated incident and Mr.

Grunning has no past discipline for failing to perform passing train inspections. The Union asserts that the dismissal of Mr. Gruning is not inline with the principles of progressive discipline. Mr. Gruning's work record is not without blemish but in no way justifies the ultimate penalty of dismissal. The Union submits that an employee must have an opportunity to demonstrate their improved performance in this specific area before more harsh punitive measure can be contemplated. The Union asserts that the information and education from the conversation with Road Foreman Deadlock and the investigation have more than met the needs of the Company to address this situation.

The Union asserts that the Company's use of E-testing for disciplinary purposes is unnecessary and excessive. The Union relies on CROA 4827 where the Arbitrator is clear that testing may be a tool utilized for raising awareness or ensuring proper understanding of rules that are not encountered in normal circumstances. The Arbitrator further suggested that these unusual circumstances can be addressed in off train simulation training without risk or delay. The Union submits that this case is similar to CROA 4827. The use of "dynamic testing" in this instance should be for the education of employees for unusual circumstances and not to entrap them for disciplinary purposes.

The Union asserts that the Company has attempted to pile on violations in attempt to exaggerate their position. The Company cites violations of rules and merely asked the question if Mr. Gruning was familiar with the rules and offered no evidence to substantiate a violation of the rule. A violation of the rules must be shown to be violated and not just assumed to have been violated.

For the foregoing reasons the Union requests that the Arbitrator reinstate Engineer Gruning without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION

The Company has denied the Union's request.

The Grievor's culpability is not in dispute between the parties. The Company maintains the Grievor's culpability as outlined in the disciplinary letter was established following a fair and impartial investigation.

Discipline was determined following a review of all pertinent factors, including those described by the Union. The Company maintains that the quantum of discipline was properly assessed, consistent with the Company's Hybrid Discipline and Accountability guidelines and the principles of progressive discipline. The Company in no way "piled on rules" to justify extreme discipline, as the Union suggests. The Grievor's dismissal was not excessive nor unjust.

As such, the Company maintains that no violation of the collective agreement, policies, procedures nor any legislation has occurred.

The Union makes reference to CROA 4621 and Arbitrator Sims' comment that efficiency test failures should not result in discipline or investigations. Arbitrator Sims also stated in this case that "The Union objects to the use of efficiency testing as a stepping stone to discipline. That is addressed above. I do not find this voids the discipline." The Company maintains it did not engage in an unreasonable application of the Efficiency Test Policy and Procedures. CROA jurisprudence has consistently held that discipline flowing from the result of Efficiency Testing can be done where merited

For the Union:
(SGD.) G. Lawrenson
General Chairperson, LE-W

For the Company:
(SGD.) F. Billings
Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
R. Araya	– Labour Relations Officer, Calgary
E. Deadlock	– Road Foreman, Calgary
K. Vu	– Audit Specialist Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, CaleyWray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Calgary
C. Ruggles	– Vice General Chairperson, LE-W, Lethbridge
B. Myre	– Vice General Chairperson, LE-W, Red Deer
R. Marshall	– Local Chairperson, Division 322, Medicine Hat
C. Gruning	– Grievor, Medicine Hat

AWARD OF THE ARBITRATOR

Background & Issue

[1] The Grievor was employed as a Locomotive Engineer and worked out of the Terminal at Medicine Hat, Alberta. He had 12.5 years of service at the time of these events.

[2] This is the second of two disputes heard at the January 2025 CROA Session which involve a similar issue. This Award is directed to be read together with **CROA 5129** for any precedential use.

[3] The facts in both cases involve the failure to perform a passing train inspection during a train "meet" at a siding. In both cases, it was argued that a passing train inspection could not be performed by the respective crews from the ground - as contemplated in CROR 110 and the Company's T&E Rules - as the Train was "*moving*" at the time of the meet. Both trains had been stopped at the siding *prior to* the meeting train approaching. In this case, the Train had been stopped for 30 minutes; in **CROA 5129**, it was determined the Train had been stopped for 14 minutes. In both cases, the Train started moving when the train that was being met was approaching.

[4] In this case, the employee disciplined was an LE; in **CROA 5129**, the employee disciplined was a Conductor. In this case, the consist consisted of one engine; in **CROA**

5129, it was an over 4,000 foot Train in an over 11,000 foot siding. Both crews are based in Medicine Hat, Alberta.

[5] Also in both cases, the actions were observed by Company Officials, resulting in discussions with – and Investigations of – each crew, and the assessment of discipline. In both cases, the Union took issue with discipline for an Efficiency Test, although that was a more prominent argument in this case than in **CROA 5129**. In that case, the Union placed substantial emphasis on the fact that - because the Train was "moving" at the time of the meet - and the Grievor was a Conductor not in physical control of the train – he had not breached any rule.

[6] Many of the same cases were relied on in both disputes; and similar facts are also at issue in each case. Both Awards are directed to be read together for any precedential use. As will become evident, this Arbitrator has significant concerns with the pattern of behaviour demonstrated by both crews and expects that pattern will no longer been seen at this Office after these two Awards are issued.

[7] This decision to "stop" and then "move" when the meeting train approaches will be referred to as "*stopping short*" by this Arbitrator.

The Issue

[8] To summarize the facts in this Grievance, on March 1, 2024, the Grievor was called for Train C23-01 with Conductor Clark, out of Medicine Hat, on the Brooks Subdivision. Their movement consisted of one single engine. The crew was directed to stop in the siding at Bowell on the Brooks Subdivision to meet train 149-28. The Grievor stopped the train, but did so near the west crossing, at Range Road 80, at 12:05 p.m., rather than at the east end of the siding, where the Train would be departing. When the Grievor saw the train coming, he began to move his train towards the east signal of the siding.

[9] As Train 149-28 passed, the Grievor and Conductor Clark did not perform a passing train inspection from the ground of Train 149-28, but looked at it out of the cab window, and then broadcast "*GoodPK 149*", which indicated there had been a "*good*" passing train inspection performed of Train 149.

[10] Foreman Deadlock, who happened to be in Bowell on his way back to Brooks, saw this occur and spoke to the crew.

[11] The Grievor was investigated for failure to perform a passing train inspection. After the Investigation, the Company dismissed the Grievor. This Grievance was filed against that dismissal.

[12] The issues between the parties are:

a. Was the Grievor culpable for some measure of discipline?
b. If so, was the discipline assessed just and reasonable? and, it not,
c. What quantum of discipline should be substituted by the exercise of this Arbitrator's discretion?

[13] For the following reasons, the Grievance is dismissed.

[14] The motivations of the Grievor were established on the evidence and found to be deliberate and manipulative, with his actions/inactions taken to avoid an obligation to be on the ground to perform a passing train inspection at the meet.

[15] Given consideration of all aggravating and mitigating factors, the discipline assessed for that culpable conduct was just and reasonable.

Facts

[16] This is the second dispute heard during the CROA January 2025 session which shows a disturbing pattern from employees who are based out of the Medicine Hat Terminal.

[17] In this case, the Grievor had a 20 day suspension and a 30 day suspension on his record when this incident occurred, all earned within the last approximately two years.

[18] While a Grievance was filed against the Grievor's 20 day suspension at the January CROA Session, that was withdrawn before the hearing. A Grievance against the 30 day suspension for breach of the Honour System of pay was heard and upheld as just and reasonable: **CROA 5133**.

[19] The Grievor was Investigated on March 7, 2024. Forman Deadlock filed a memorandum into the Investigation. The Statements of the Grievor and Conductor were also filed as evidence. Foreman Deadlock stated that he had stopped in Bowell on his way back to Brooks, to "*grab a list of the OCS Cars in the backtrack*" and that he "*heard RTC ask for their signal back to hold them [the Grievor's Train] at Bowell for a meet and not delay Train 14*" which was out of Medicine Hat. He stated that as Train 149-28 was "*approaching the public crossing near the west end of Bowell, the CP 8629 engine started to move slowly towards the East End not making any effort to stay stopped or get outside to perform a passing train inspection of train 149*". This was approximately 35 minutes after he observed the Grievor's Train enter the siding.

[20] It was after he heard the Grievor broadcast "*GoodPK149*", that Mr. Deadlock made identification with the crew and asked them to stop their engine. His memo indicated he entered the cab and discussed with the crew the time they had been in the siding and the requirement to be outside and to perform passing train inspections. He indicated the crew was "*receptive to my feedback*" and "*understood the conversation*".

[21] Conductor Clark was working with the Grievor for that tour. He had approximately 10 months of service. In his Investigative interview, he confirmed a job briefing had occurred regarding safely stopping "*short of Bowell west and that we would be going into the siding*" (Q/A 19). Conductor Clark also confirmed no passing train inspection was performed. The reasonable question of whether the crew engaged in non-railway duties during their tour was improperly objected to by the Union representative as "*speculative*". It was not a speculative question (Q/A 21). The Grievor answered "*no for myself*". He confirmed the weather was "*clear*" (Q/A 25) and that the information in Foreman Deadlock's memo was "*correct*".

[22] He confirmed the train was in the siding at 12:06 p.m, and had stopped "west" of the crossing at mile 15 (Q/A 30). Conductor Clark confirmed Train 149-28 had taken approximately five (5) minutes to traverse between crossing the east signal at Bowell (at 12:40) and the west signal (at 12:45). He also confirmed the crew's train began to move at 12:41. Conductor Clark confirmed all crew members were in the cab during this meet, and that a passing train inspection was not performed "*on the ground but we did watch*

the train from the inside of the cab" (Q/A 34). He also confirmed that Bowell provided a safe location for performing a passing train inspection.

[23] The Union representative improperly objected to the question asking the Conductor if he communicated with the Grievor to stop the engine so a passing train inspection could be performed. That is not an improper question and no objection should have been taken. The Conductor answered that he "*did not*". When asked why the Train started to move forward, the Union representative again made an improper objection to the question as being "*speculative*". It was not. The Conductor stated "*we pulled down to get a clear view of the east signal at Bowell*". The Union representative improperly objected to the next question as well, which was "*could you have pulled down to the east end of Bowell when you first initially arrived at Bowell?*", which was a fair and appropriate question. The Conductor answered "y*es, we definitely could have"* (Q/A 39).

[24] When asked if he understood his duties included the requirement to perform a passing train inspection, the Union representative again improperly objected that the question was "*argumentative*". It was not. The Conductor answered "*yes, I do"* (Q/A 40). The Conductor also confirmed his understanding that it was a requirement of his job to be on the ground to do so, when duties permitted (Q/A 41) and that this was "*so you can physically see, smell or hear a defect"* (Q/A 42); and that such inspections are "*fundamental"* to the safe operations of trains (Q/A 43). When asked if he had anything further to add, the Conductor stated "*let the record speak for itself*".

[25] The Grievor was also Investigated. A different Union representative was present for his interview. Several objections were placed on the record regarding the evidence during both Investigations, which were not pursued by the Union at this hearing.

[26] When asked about the job briefing, the Grievor stated, in part "*We came to a stop and position ourselves so we could see the signal. Then we pulled into the clear at Bowell*" (Q/A 19). The same objection was placed on the record for any non-railway duties, which again was a proper question. The Grievor denied any such activities. He also confirmed the day was clear and sunny (Q/A 25). The Grievor confirmed the crew members were in the cab at the time of the meet (Q/A 33). When asked if a passing inspection was completed, the Grievor stated "*Not a standard passing inspection, we*

*were not on the ground. We did inspect 149 from my side window and the results were broadcasted" (*Q/A 34). When asked to explain how he "*performed a good PK" if you were positioned in the cab…*", the Grievor stated he "*had my window open, and I could see and hear as 149 passed by*" (Q/A 35). He confirmed Bowell was a location with acceptable risks to conduct a passing train inspection, regarding terrain and layout (Q/A 36).

[27] When asked if he communicated with his Conductor "*in regard to not pulling down to perform a passing train inspection on train 149-28 at Bowell*", the Union again entered an improper objection of "self-incriminating" question. That was not an inappropriate question. It was a fair question. The Grievor answered "*no, it was not discussed*". He confirmed his engine stopped "*just clear of the west signal*" (Q/A 38). When asked why the engine started to pull east, 30 minutes after stopping, the Union again objected to the question as being "speculative". It was not. The Grievor answered "*We heard them coming so we figured we could pull down. Once they cleared, we could depart*" (Q/A 39).

[28] That is not responsive to this Question. The Grievor did not explain why he "*figured*" he could "*pull down*" only when the train was "*coming*", and not before, so that he could have been in position to perform a passing train inspection. When asked in the next question whether the Grievor had understood his job was to be "*position on the ground to perform Passing Trains Inspections and when your duties and terrain permits*", the Union again objected to this proper question as "*argumentative*". It was not. The Grievor answered "*yes, but we were moving*".

[29] It must be recalled it was the Grievor's own *choice* not to pull down to the signal when entering the siding, or any time in the 30 plus minutes he had been in that siding, waiting for the meet. No explanation was offered for why the Grievor did not position the Train to perform a passing train inspection of Train 149.

[30] When asked whether he was supposed to be "*positioned on the ground*" to conduct a passing train inspection, the Union argued the question was "*argumentative*", which it was not. The Grievor stated "*yes, to get a better vantage point of the train passing by*" (Q/A 41). He also understood that such inspections are fundamental to safety.

[31] When asked at Q/A 52 if he had anything to add, the Grievor stated "*In hindsight we should have stopped at the crossing performed a proper passing train inspection. I will continue to work in a safe and sufficient manner to ensure me and my fellow coworkers go home safe*".

[32] The Company dismissed the Grievor after that Investigation.

Summary of Arguments

[33] The Company argued that cause for discipline was established. It pointed out the crew did not leave the cab of the locomotive, despite the fact they were stopped at the siding for a significant period of time waiting for the meet. It argued that was a safe location for the crew to have left their cab and to have positioned themselves along the track for the meet, to perform the passing train inspection. They failed to do, which is culpable behaviour. It argued the Grievor did not provide a valid reason for not doing so, even though conditions permitted that action. It urged the Grievor's actions were designed to excuse themselves from performing a passing train inspection by stopping far back and then moving when they heard the train approaching. It argued this was not an Efficiency Test, as Mr. Deadlock was performing his regular duties and happened to observe the crew, which do not meet the criteria established in **AH860**. Further, the Grievor confirmed he did not perform a passing train inspection as required by the rule, even though it knew it would be required to wait for at least 35 minutes before the train arrived. It urged the crew had ample time and that their duties permitted them to get out of the locomotive and perform the passing train inspection. It argued the Grievor then compounded this behaviour by stating that he had performed a "goodPK" on Train 149. The Company argued this was a serious violation, which raised concerns with the Grievor's inability to follow fundamental safety rules regarding passing train inspections and maintained that given the trust which the Company must maintain in running trades employees, its discipline was just and reasonable. It argued the Grievor's record was not "relatively minor" as argued by the Union, but had a history of safety violations and that the Company took into account all aggravating and mitigating factors.

[34] The Union argued there was no cause for discipline established, and alternatively that the penalty of "outright dismissal" was unjustified and unwarranted, given there was no accident or incident, and the Grievor accepted responsibility. It placed considerable emphasis on the fact this was an Efficiency Test and that this was the Grievor's first "fail" for an Efficiency Test. It argued the education given by Foreman Deadlock was sufficient to meet the needs of the Company. It argued this was a brief lack of judgment and that dismissal was excessive for these types of offences; and that this was not a culminating incident. It also argued progressive discipline was not followed. It argued the Company's guidelines on what is "major" or "minor" are immaterial and does not relieve the Company from applying the usual criteria to determine if the quantum of discipline was appropriate; it argued the infractions on the Grievor's record were "relatively minor", and that he had several years of discipline-free service, between 2017 and 2020. It argued the Company failed to consider all of the mitigating circumstances and that the Company was "piling on" – demonstrating a degree of "over-aggressiveness - for this Grievor, as the Company was unable to demonstrate any breach of the Rule Book for T&E employees and that performing passing train inspections "from the window" was a common practice when crews move past each other. It also pointed out that Foreman Deadlock failed to take any steps to perform the inspection himself. It also distinguished the Company's authorities.

[35] Each party also distinguished the authorities of the other.

Relevant Provisions

CROR Rule 110 Inspecting Passing Trains and Transfers

> *(a) When duties and terrain permit, at least two crew members of a standing train or transfer and other employees at wayside must position themselves on the ground on both sides of the track to inspect the condition of equipment in passing trains and transfers…*
>
> *(b) Employees inspecting the condition of equipment in a passing freight train or transfer must, when possible, broadcast the results of the inspection.* (emphasis added)
>
> *…*

Rule Book for T&E Employees, Section 11.7

> *Crew Inspecting*
>
> *When stopped, and duties and terrain permit, all crew members must position themselves on the ground on both sides of the track to inspect the condition of equipment in passing movements. …*
>
> *(a) Employees inspecting must, when possible, broadcast the results of the inspection.* (emphasis added)
>
> *…*

Analysis & Decision

[36] The question that has arisen in both this case and in **CROA 5129**, is whether the crew can place themselves in a position to not be able to perform a passing train inspection, by their own manipulation of the movement of their train.

[37] I am satisfied they cannot, and that to do so was culpable behaviour.

[38] I am further satisfied that this is an appropriate case for significant discipline under the Efficiency Test framework.

[39] As earlier noted, this is the first of two Grievances heard during the January 2025 CROA Session, which involved similar misconduct. A disturbing pattern has emerged in both cases.

[40] That pattern of behaviour demonstrates a deliberateness in action/inaction of an employee to manipulate his or her movement at a siding, to avoid an important job obligation. The pattern is that the train stops the train well "*short*" of a signal in the siding, and then only moves *towards the signal* – and the approaching train - as the meeting train approaches. As the train is then "*moving*" when it meets the approaching train, the crew then takes the position that a passing train inspection cannot be performed on the ground, given that the train is not "*stopped*" at the relevant time.

[41] I am satisfied this method of "*stopping short*" and "*moving late*" involves a deliberate choice to manipulate the movement so as to avoid having to get out of the cab, stand on the ground and perform a passing train inspection.

[42] I am satisfied both crew members have culpability for “stopping short”, although for different reasons. The responsibility of a Conductor in this situation is addressed in **CROA 5129**.

[43] The Union placed considerable emphasis on the fact this was an Efficiency Test and should not be subject to discipline. The memo of Mr. Deadlock was filed into the Investigation. His evidence was he had stopped in at Bowell when returning from Brooks, to grab a list of the OCS Cars in the backtrack, and heard the RTC’s instructions to the Grievor’s crew. Mr. Deadlock was on site and able to view what was happening as he had stopped in Bowell on his way back from Brooks.

[44] While I agree with the Company that this would not have qualified as a situation where Mr. Deadlock was performing efficiency testing on this crew – since Mr. Deadlock was not at that location to perform Efficiency Testing but was at Bowell to perform his other duties - the Company made a decision to consider it to be a failed Efficiency Test and entered it into the record as such. As a result, the framework developed by this Arbitrator in AH860 is appropriately applied.

[45] Looking first at the incident itself, the severity of the misconduct is significant, on the findings of fact in this case, as noted below. This is not a situation of failing to perform a passing train inspection, as is usually seen; such as where a grievor might leave the premises and just not do the inspection. This case involves a measure of deliberateness and manipulation of the train to support that decision.

[46] The Grievor did not move the Train until *just before* the train arrived which he was to meet, even though he had been sitting in the siding, waiting for the meet, for more than 30 minutes. Driving the Train was not this Grievor’s only duty that day. I am satisfied the Grievor was under a positive obligation to handle his Train in the siding in such a manner so as to place himself in a position to perform the *other* duties of his work.

[47] Those other duties included exiting his cab to perform a passing train inspection from the ground at that meet, where possible given the terrain and layout – and given timing. I am satisfied the conditions permitted that action, in this case. He was to stop to meet Train 149; he did stop for over 30 minutes. He had the ability to position his train

to perform his other duties from the ground, given the circumstances of this meet and the timing available.

[48] The reasonable inference from the evidence – which I am prepared to draw – is that the Grievor's choice to position the train "short" of the signal and wait for 30 minutes - and then only start to move when the train passed - was a calculated and deliberate action designed to avoid this obligation to perform a passing train inspection from the ground.

[49] I am further satisfied the Grievor had the ability and opportunity to perform that inspection from the ground that day, and he was aware that was the type of inspection that was required when he had been stopped, but that he chose to handle his Train in this siding by manipulating his Train to avoid that requirement. It does not then lie with the Grievor to argued he could not perform that obligation *because* his train was moving, when it was his own inactions/actions which created that situation.

[50] Further, the Grievor did not perform a passing train inspection as required, when he watched Train 149 out of his window because he manipulated his train to be in motion at that time, instead of detraining and performing a passing train inspection from the ground. The Grievor's actions had a level of deliberateness and manipulation of his train to *avoid* his duty – given that he maintained he could not perform that task because he was "*moving*" in explanation; with what he described as a "*non-standard*" inspection being performed. That explanation is disingenuous and this is unusual behaviour not often seen in these types of cases. Given the time he was in the siding, the Grievor could have easily pulled his train up towards the signal at an earlier point - or even when entering the siding – and thereby placed himself in a position to perform that inspection. He had an obligation to do so, where conditions permitted. Watching a train out of the window when an opportunity to perform a passing inspection from the ground has been squandered is not an explanation for not performing that obligation as required.

[51] Neither does the work history of the Grievor support a coaching response. The Grievor had 50 days of suspension on his record at the time of this event, and 45 days was judged reasonable after **CROA 5133**. That is a significantly negative work history. It is of note that his 45 days of suspension were earned in the most recent two years. They

are not dated. While the Union argued the discipline was of a “minor” nature, I cannot agree. The Grievance relating to the 20 day suspension was withdrawn; the 30 day suspension was for a breach of the Honour System of pay and a 25 day suspension was substituted as reasonable, which is not “minor”.

[52] With two of the three threshold factors supporting discipline – and with a significant obligation as a passing train inspection is accepted to be in this industry, discipline would be appropriately assessed in this case, as the threshold question would be answered in the affirmative.

The Wm. Scott Analysis

[53] Turning to a *Re Wm. Scott* analysis, similar questions are asked as with an Efficiency Test analysis, but these questions are asked in determining appropriate discipline.

Was the Conduct Culpable?

[54] Given the reasoning noted above, it is by now obvious that the argument that this resulted from a “brief lapse of judgment” is not compelling. Neither is it compelling to argued that progressive discipline was not followed. In this case, the train was indeed “stopped”.

[55] The crew took a considerable risk bringing the train to a stop at a point which has been determined to be calculated to avoid placing themselves in position to perform their other job obligations.

[56] The Grievor in fact offered no explanation for why he did not do stop closer to the signal and so be in a position to get out of the cab and perform the passing train inspection. His answers on this point were unresponsive. To compound his misconduct, the Grievor then broadcasted that he *had* performed the passing inspection as he was required to do, when he had not.

[57] I do not accept the Grievor’s evidence that he performed a “non-standard” passing train inspection to be reasonable. As noted above, I am satisfied on a balance of probabilities that his actions in moving this Train forward to coincide with the approach of the meeting train were deliberate and manipulative, to avoid getting out of the cab to

perform a passing train inspection. I am further satisfied that performing those duties was part of the Grievor's job on that day; which duties were not appropriately performed on March 1, 2024. I am persuaded by the Company's arguments that the Grievor's actions were deliberate, manipulative, culpable and deserving of discipline.

[58] The next question is what measure of discipline was just and reasonable, given all of the mitigating and aggravating factors.

Question Two: What is the Appropriate Measure of Discipline?

[59] It is not disputed that railways are safety-sensitive operations, as noted by many Arbitrators who adjudicate in this industry. It has been described as one of the most highly safety-sensitive industries in this country. I am satisfied that passing train inspections serve an important role in maintaining safe operations, as previously recognized by this Office: see for example **CROA 4381**.

[60] I am further satisfied from the jurisprudence that such inspections when properly performed can alert the Company to serious issues and prevent what could be catastrophic results.

[61] It is unnecessary to consider the specific example relied upon by the Company. I agree with the Union that no evidence was offered to support that example and it is inappropriate to consider it. However, as have other Arbitrators adjudicating in this industry, I am prepared the accept the importance to safe operations of the performance of passing train inspections. Arbitrators also recognize the significant trust that the Company must maintain in its employees to act with integrity and properly perform their work obligations in this industry, given both its safety-sensitive nature; and that its employees must work largely unsupervised. Given those two realities, a review of the jurisprudence demonstrates that as a general theme, Arbitrator's find particularly concerning issues which bring into question *both* the commitment to safety and an individual employee's integrity. When both issues are combined in one dispute, the Company reasonably has considerable concerns.

[62] In this case, the Grievor's actions impacted both his obligations to work safely and his integrity.

[63] The Union has argued that failure to perform a passing train inspection is not a "dismissible offence" in this industry. It argued that a penalty of 15-20 demerits was appropriate for failure to perform a passing train inspection. The facts of a particular situation are always relevant to that determination and this type of "blanket" type of statement is not supportable. While the Company's discipline policy is unilaterally promulgated and currently under grievance, any progressive system *can* support discharge for one particular event, depending on the significance of all of the factors, which include the severity of the misconduct; and a review of the aggravating and mitigating factors (including the Grievor's disciplinary record and length of service and factual issues such as provocation and patterns of behaviour). What may be dismissible behaviour for one employee with a significant record may not be for another who does not share that same perilous record; or who has longer service to place against it.

[64] Precedents are of limited use for the second *Wm. Scott* question, since no two fact situations or combination of factors will be the same. In over 100 decisions written in this industry in just shy of two years, this is the first situation of this type that this Arbitrator has encountered.

[65] In *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. No. 98, Chair Weiler stated:

> …*It is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question* (at p. 8).

[66] The analysis of whether this incident is sufficient to result in dismissal is – as noted by Chair Weir – part of the analysis which Arbitrator's must undertake in reviewing <u>all</u> of the mitigating and aggravating factors under that well-accepted framework, to consider whether the discipline was just and reasonable, and not just placing reliance on the employer's internal discipline policy.

[67] No adjudicator takes that responsibility lightly.

[68] The "culminating incident" doctrine is often mentioned. That doctrine requires that the final incident which leads to dismissal be culpable, which is also the first question that

must be determined under a *Wm. Scott* analysis. Once culpability is determined, then what are known as the *Wm. Scott "*factors" are appropriately reviewed to determine if dismissal was reasonable, whether the incident is alleged to be "culminating" or not. The list of "factors" is not closed.

[69] As noted by the Supreme Court of Canada in *McKinley v. B.C. Tel* [2001] S.C.J. No. 40, a starting point is the principle that discipline must be *proportional* as well as *progressive.* This means that more significant and severe misconduct will properly result in greater discipline. The building effect of discipline is well-recognized in labour relations and therefore an employee's discipline record particularly relevant in determining if further progression - other than dismissal - is appropriate. Each factual situation will be unique.

[70] It is not only the length of service, but also its "quality" which is relevantly considered. I therefore cannot agree with the Union that dismissal would never be appropriate for failing to conduct a passing train inspection. That type of statement cannot be supported when a detailed analysis is required.

[71] Neither does the jurisprudence support that 15-20DM is always the appropriate discipline, given that under the Brown System which was previously followed, dismissal could occur for accumulation, even where the last assessment was of a lower number. Several of the cases tabled resulted in dismissal for accumulation, which would have been known at the time dismissal was assessed. In other words, 15DM was "sufficient" to reach dismissal in those cases, and a higher measure was unnecessary to reach that point.

[72] For example, in **CROA 3924**, the imposition of 15 DM put the grievor over 60 demerits, which resulted in dismissal for a grievor with almost 22 years of service. The arbitrator substituted an 11 month suspension for that 15 demerits (and dismissal), but that individual had also not had an operating violation for 21 years. That level of suspension was significant. The Grievor in this case does not have that level of service, neither can be boast the same record.

[73] The Company relied on **CROA 4604**, where a long service grievor failed to do a pull by inspection and also avoided taking responsibility for that failure. However, in that

case, the Grievor was subject to a last chance agreement when he was disciplined. Certain other discipline prior to that point was also substantially reduced, affecting the impact of his disciplinary record. The Grievor does not have the level of service – or quality of service – of that grievor, either, to mitigate his penalty.

[74] In **CROA 3711**, while the Grievor's early work record was checkered, his most recent record was stronger, although he still stood at 45 demerits. The arbitrator took that *more recent* record into account in reinstating the grievor, given the stronger performance in his most recent years. He provided a "*last chance opportunity to demonstrate that he can work in compliance with operating rules and Company regulations*" (at p. 3).

[75] While the level of service was not stated, there was reference to work in the "90's" and the decision involved an incident in 2008, so that grievor would have had lengthier service than the Grievor in this case. The Grievor's record in the last two years is *worse,* not better, than his earlier record, which is opposite of the facts in that case.

[76] The Union offered several cases to support an assessment of 15-20 DM. I have reviewed that jurisprudence, but it is distinguishable or lacks reasoning to consider its precedential value. **CROA 4342** for example offers "findings and declarations" but not the reasoning for that decision. Findings and declarations are of little precedential value without the underlying facts.

[77] In **CROA 4686**, there was legitimate confusion regarding when the train was due to arrive where the pull by was to occur, which is not these facts.

[78] **CROA 4604** and **3711** have already been addressed, above and were also relied on by the Union. **CROA 4381** involved a grievor with 23 years of service, which is substantially more than this grievor. Two incidents were at issue, with the first not being established. While a train inspection was performed "out the window" in that case, there was no similar manipulative movements of the train, and the grievor had been treated more harshly than his colleagues. He was assessed 20 DM. That case does not demonstrate as significant behaviour as these facts.

[79] In **CROA 4366**, relied on by both parties, the reasons the 25 year employee did not leave the cab were found to be ***bona fide***, rather than neglect or disobedience. While

his fear was found to be legitimately held, it was not found to be "objectively correct" and so did not excuse his failure to properly perform the inspection and culpability was found. 20 demerits were imposed in that case. That case is not as significant as the Grievor's situation. That case also recognized that more severe discipline was appropriate where there were instances of an employee deliberately ignoring their obligations, which had not occurred in that case but has been found in this one.

[80] Turning to the application of the relevant *Re Wm. Scott* factors in this case, the first factor is the nature of this particular misconduct.

[81] As already noted, this misconduct is significant and very concerning in this safety-sensitive industry. It is not what is normally seen when passing inspections are not performed. There is a deliberateness, but also a manipulation of duties in the Grievor's actions in this case that is very concerning both to the Company and to this Arbitrator, and which is aggravating for discipline. The misconduct is appropriately subject to strong censure and deterrence. LE's who play fast and loose with their job obligations in this manner by manipulating their movements to avoid safety obligations take on considerable risk. Deception and manipulation of job duties strike at the employee's obligation to act with integrity; and the obligation to perform all of the required job duties.

[82] Neither can I agree the Company was "piling on" in this case, as alleged by the Union. The pattern of behaviour supported that the Grievor engaged in deliberate misconduct taken to avoid his legitimate job duties. The Grievor's actions engaged issues of both integrity and safety. There was no credible explanation offered by the Grievor regarding his actions, other than manipulation to avoid his job duties. The Grievor's unresponsiveness to the question of *why* he stopped where he did - and his lack of explanation for his actions – are aggravating factors.

[83] The Grievor was sitting at 45 days of suspension, earned between 2022 and 2024. The Grievor was already in a precarious employment position at the time of this event, even only considering his last two years. Neither do I agree his record was for "minor" infractions, as argued by the Union. The 30 day suspension was vacated and a 25 day suspension was substituted in **CROA 5133**. That level of discipline cannot be said to be "minor". The Grievor was found to have been careless, negligent and showed a lack of

judgment in that case for an important job duty. The Grievor's record is an aggravating factor for discipline. At 45 days of suspension, dismissal was looming closer for this Grievor under a progressive discipline system no matter what the infraction, so I cannot agree with the Union that progressive discipline was not followed for this Grievor.

[84] It could be maintained that with 50 days of suspension on his work record (as it was then), the Grievor should have exercised particular diligence to carefully perform all of his work obligations, or risk dismissal.

[85] Neither did the Grievor show insight or a convincing level of remorse, during his Investigative interview that could be mitigating. For the Grievor to maintain until the end that he could not perform the inspection because he was "*moving*" – when the choice was made to stop for more than 30 minutes at a more distant point, and then only move when the train was coming - was disingenuous. It demonstrated a considerable lack of insight into the culpability of his behaviour which is concerning and an aggravating factor for discipline. A commitment to "*continuing*" to work in a safe manner further does not show insight into the fact the Grievor did *not* in fact choose work in a safe manner that day, when he failed to inspect Train 149-28.

[86] Neither was any apology made to the Company. The Grievor's only recognition was that he "should" have performed the inspection, after caught for not doing so. That is not a convincing level of sincere remorse.

[87] The only mitigating factor of any strength is the Grievor's level of service. At 12 years, that is substantial. Unfortunately for this Grievor, the quality of that service is not particularly strong, especially over the past two years. The most significant discipline is also the most recent.

[88] Considering all of the factors, regretfully for this Grievor, his level of service is insufficient to outweigh the aggravating factors present on these facts. I am satisfied that the bond of trust which the Company must maintain with running trade employees to perform all of their job duties safely and with integrity has been irreparably broken.

[89] The obligation to keep this industry safe does not just rest with the Company, but is shared by employees – and by Arbitrators. As is likely obvious by this point in the

Award, this Arbitrator was particularly struck – and reasonably concerned - with the pattern of manipulative behaviour demonstrated in this case and in **CROA 5134** to avoid an important safety task.

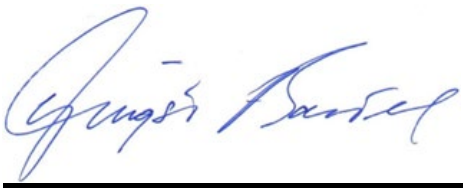
[90] Given that reality, this is not an appropriate case which would attract my discretion to alter the Company's just and reasonable penalty, final though it is, and reinstate the Grievor.

[91] The Grievance is dismissed.

[92] This Award is more detailed than those normally seen under this expedited process, to serve as an educative tool for employees that when they play "fast and loose" with important safety obligations, such "gamesmanship" will be treated with the utmost seriousness, should it reach this Office.

[93] Given that both **CROA 5129** and this case involved employees based in Medicine Hat, the parties are directed to post both Awards in that Terminal, for a period of 30 days.

I remain seized with jurisdiction for any questions relating to the implementation of this Award; for any issues arising from my directions; to correct any errors; and to address any omissions, to give this Award its intended effect.



March 26, 2025

CHERYL YINGST BARTEL
ARBITRATOR