CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5157

Heard in Edmonton, March 13, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 demerits assessed to Conductor Travis Tone ("the Grievor") of Medicine Hat, AB.

JOINT STATEMENT OF ISSUE:

Following a formal investigation Mr. Tone was assessed 20 demerits on November 14, 2024, for the following:

"In connection with your work history from September 17, 2023 - November 6, 2023, while employed as a Conductor in Medicine Hat, AB. A violation of the T&E Availability Standards."

UNION 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 contends the Company's failure to properly respond to the Step One appeal is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA. The Union does not agree that Article 40.04 provides the Company with the liberty to not respond to grievances as they see fit.

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above. Additionally, it is the Union's position that the Company has failed in providing the absence in question was not bona fide. The Company alleges a violation of the T&E Availability Standard, which has not been substantiated.

The Union contends the discipline assessed is arbitrary, unwarranted, unjustified, and excessive in all the circumstances. The Union contends that the discipline is in violation of Article 35 of the Collective Agreement, Duty and Rest Period Rules, CP Rail's Fatigue Management Plan and Policies HS 4552 & 5830, and the Canada Labour Code. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union disputes the application of the Hybrid Discipline & Accountability policy in the instant matter.

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

COMPANY POSITION

The Company disagrees and denies the Union's request.

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

The Company disagrees with the Union's allegations pertaining to the local grievance response, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure.

The Company carefully considers the appropriate disciplinary consequence, if any, to be assessed. Discipline was determined following a review of all pertinent factors, both mitigating and aggravating, and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the *Hybrid Discipline and Accountability Guidelines*.

The Company's position continues to be that the discipline assessed was not excessive or arbitrary and was in fact just, appropriate, and warranted in the circumstances.

The Union alleges that the Company violated the Canada Labour Code, the Collective Agreement (Article 35), CP Fatigue Management Policy, the Duty and Rest Period Rules and Policy HS 4552 & 5830. The Company does not see a violation of these or any cited authority, policy/procedure referenced by the Union.

The Company requests that the Arbitrator dismiss the grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chairperson	Director Labour Relations

There appeared on behalf of the Company:

F. Billings	– Director Labour Relations, Calgary
R. Araya	– Labour Relations Officer, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
J. Hnatiuk	– Vice General Chairperson, Coquitlam, British Columbia
T. Stehr	– Local Chairperson, Medicine Hat, Alberta via Zoom
T. Tone	– Grievor, Medicine Hat, Alberta via Zoom

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Union has raised several preliminary objections in this dispute. One of those objections is that the Company has not properly raised the issue of "patterned

absenteeism" in the JSI and this Arbitrator therefore does not have jurisdiction to address that issue, in this process.

[2] That issue will be addressed as preliminary, as if the Union is successful, the Company will be unable to meet its burden to establish culpability for the Grievor's absences.

[3] For the reasons which follow, the Union has persuaded this Arbitrator of its position. The Company has failed to raise an issue that the Grievor was guilty of patterned absenteeism. It is unable to meet its burden to establish culpability.

[4] The Grievance is upheld and the discipline vacated.

Analysis & Decision

[5] The arguments of the parties on this issue are straightforward.

[6] The Union maintains the Company's generic grievance response does not allege the pattern absenteeism which it argued in its submissions and at this hearing. It argued that under Article 14 of the CROA Memorandum of Agreement (last revised in November of 2023; the "CROA Agreement"), the parties have agreed that this Arbitrator only has jurisdiction over those issues which are set out in the Joint (or *ex parte*) Statement(s) of Issue. It argued this issue was not so set out. The Union argued that prejudice resulted to the Union, as the Union has not had the appropriate opportunity to prepare for that issue.

[7] For its part, the Company conceded that the Grievor's absences "*when viewed in isolation may not establish culpability*" but argued *"…when viewed together it demonstrates that the Grievor exhibited a pattern of absenteeism that led to the Company finding the Grievor culpable"* (at para. 20). The Company argued the reference in the Joint Statement of Issue to the Grievor's "*work history*"; to a particular date range; and to the T&E Availability Standards when taken together raise this issue. It also argued there is no prejudice to the Union in this case. It also pointed to its Employee Notification Letter which referred to the T&E Availability Standards; to the Notice of Investigation and the Appendices; and to the questions in the Investigation on this issue. It pointed out that on five occasions in the Investigation, the Grievor was questioned whether he booked sick

and/or unfit with the *intention to extend* his time off. It argued the issue was properly raised.

[8] CROA operates a unique and expedited Arbitration process in this country. The CROA Agreement sets out the "rules" the parties have agreed will govern. The process provides significant efficiencies to the parties by allowing multiple cases to be heard by an Arbitrator in a three day session in any particular month. There are trade-offs that have been negotiated by the parties, however, to support those efficiencies.

[9] Article 7 of the CROA Agreement requires that a "request for arbitration" by this Office must be accompanied by a "Joint Statement of Issue" or JSI. The JSI is a unique and important document to this process. If the parties cannot negotiate and agree on that document, they are not entitled to advance the Grievance to this Office unless they are given permission by the Arbitrator to file their own Statements of Issue (called "*Ex Parte"* statements): Article 10.

[10] While there was some question in the past as to whether that permission was actually sought by the parties or not, the current Arbitrators of CROA - who must interpret the revised CROA Agreement - have provided notice to the parties that they will be enforcing the parties' agreement for that requirement.

[11] That Article states:

> The **signatories agree that <u>for the Office to function as it is intended</u>, good faith efforts must be made in reaching a** joint statement of issue referred to in clause 7 hereof. **Such statement** shall <u>contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated.</u> In the event the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority <u>to grant or refuse such application</u> (underlined emphasis added; bold demonstrates changes made in November of 2023).

[12] In the jurisprudence of this Office, it is well-established that the JSI serves to narrow the issues brought before the Arbitrator, and also prevents "litigation by ambush". This occurs because both parties either agree to – or are at least made aware of – the

issues remaining between them *when the JSI is filed,* which is well in advance of the hearing, under the Office's scheduling policies.

[13] Under the CROA Agreement, the parties also file written Briefs with the Office shortly before the hearing, where their arguments are developed and jurisprudence is addressed. While the Briefs are more expansive than the JSI for developing the parties' arguments, the underlying "*dispute or question*" must still be one that has been initially included in the JSI, to be addressed by an Arbitrator at the hearing.

[14] In fact, Article 14 of the CROA Agreement specifically limits this Arbitrator's jurisdiction to the "*disputes or questions*" which are included in the JSI. It uses mandatory language to do so. It states (in part):

> The decision of the arbitrator shall be limited to the **disputes or questions contained in the joint statement** submitted by the parties or in the separate statement or statements as the case may be, or where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions… (emphasis added).

[15] I am satisfied that with this language, the parties anticipated there could be circumstances where a party seeks to introduce a "*dispute or question*" that is not included in the JSI later, at the hearing. The parties have addressed whether or not an Arbitrator has jurisdiction to address that issue.

[16] The CROA Agreement does not state that an Arbitrator has jurisdiction over the "dispute or question" where it is found the party objecting has not suffered "*prejudice*". Neither does the CROA Agreement state that "*so long as the issue was raised in the grievance process or the Investigation*", that is sufficient. The clear requirement is that the "*dispute or question*" itself must be included in the JSI.

[17] What Article 14 *does* state is that an Arbitrator is denied *jurisdiction* if the "*dispute or question*" is not referred to in the JSI. Connecting the JSI to an Arbitrator's underlying *jurisdiction* demonstrates the importance to the parties of ensuring the "*dispute or question*" is set out in the JSI.

[18] Often the JSI simply reproduces the statement of the dismissal itself to frame the dispute. However, if the underlying statement was broad or lacked specificity, then the JSI could be found to not raise the issue that is actually in dispute.

[19] It may be that in the past, the Union has not raised an objection in every case that the JSI was deficient. The Union has raised that issue in *this* case, however, and no estoppel was argued by the Company against that position.

[20] Turning to the facts of this case, the Union is correct that the Company has provided a "*generic*" response to this Grievance, which is very similar to its responses to other grievances, under this process. While that is the Company's prerogative, should it choose to provide a "*generic*" response which lacks detail for its position on the specific dispute, it leaves itself open to the argument that its response does not properly raise the issues which it then seeks to develop later in its written submissions.

[21] That is what has occurred in this case.

[22] In this case, the statement from the Grievor's discipline letter – which was reproduced in the JSI - was that he was being disciplined:

> In connection with your work history from September 17, 2023 - November 6, 2023, while employed as a Conductor in Medicine Hat, AB. A violation of the T&E Availability Standards.

[23] That statement does not set out what it *is* about the Grievor's work history that was objectionable to the Company. In its submissions, the Company argued the Grievor's "*work history*" exhibited a "*pattern absenteeism*", which is what supported its discipline choice. The reference to any "pattern" of absenteeism in the JSI is noticeably lacking.

[24] The Company argued that its reference to the T&E Availability Standards when combined with this "*work history*" was sufficient to raise this issue, in the JSI.

[25] The difficulty for the Company's argument is that – while "*pattern absenteeism*" is one type of misconduct which could attract discipline under the T&E Availability Standards – it is only one of ***several*** forms of misconduct referenced in that Standard. I am not satisfied that – given the different types of misconduct in the T&E Availability Standard – the reference to the Grievor's "*work history*" made in conjunction with date references and

a reference to the Standard is sufficient to raise the "*dispute or question*" of whether the Grievor is guilty of "*patterned absenteeism*". To make that finding would be to defeat the purpose – and importance - of the JSI for narrowing the focus of the dispute and avoiding "litigation by ambush".

[26] To accept that such a broad reference as sufficient would strip the JSI of its utility in this process. The Union is entitled to be made aware *in the JSI* of what the alleged difficulty with the Grievor's "*work history*" actually *is*, and how the Grievor is alleged to have breached the T&E Availability Standard. To simply refer to "*work history*" without that context does not stipulate *how* that history is deficient, or why the Grievor is culpable for discipline.

[27] **CROA 4715-D** illustrates *how* that issue could have been outlined in the JSI, to put the question squarely before the Arbitrator. The parties in that case filed *Ex Parte* statements of issue. Both parties in that case raised the "*dispute or question*" of whether the Grievor was guilty of patterned absenteeism and/or an inappropriate use of the "booking unfit" clause. The discipline of that Grievor – copied by the Union – specifically referred to "*exhibiting patterned absenteeism on three (3) occasions (21-Nov-17, 01-Dec-17 & 16 Dec-17) with two (2) instances occurring on weekends. A violation of Canadian Pacific Attendance Management Policy…"* The Company then referred specifically to that issue in its *Ex Parte* statement of issue as follows: *"[t]he Union states that the Company cannot assess discipline for use of the unfit clause. It remains the Company's position that the unfit clause is not to be abused or used to inappropriately obtain time off work*".

[28] Those statements put that issue squarely before the Arbitrator. That is the *basis* for that grievor's culpability.

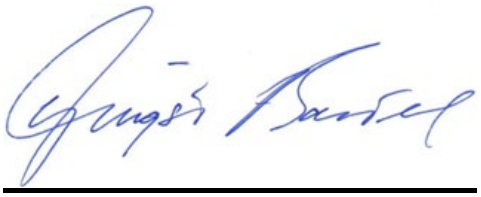
[29] That contrasts with the lack of specificity in this case.

[30] I am satisfied the JSI in this case does not serve to properly raise a "*dispute or question*" *of whether there existed a pattern of absenteeism* for this Grievor. Given that the Company has not properly raised the "*dispute or question*" of patterned absenteeism in the JSI, I have no jurisdiction to entertain that position.

[31] Without an allegation of patterned absenteeism, the Company has not met its burden to establish the culpable misconduct of the Grievor, under the first test of the familiar *Re Wm. Scott* framework. As culpability has not been established, no cause for discipline exists as against this Grievor.

[32] The Grievance is upheld. The 20DM are vacated.

I retain jurisdiction to address any questions regarding the implementation of this Award; to correct any errors; and to address any omissions to give this Award its intended force and effect.



May 1, 2025

CHERYL YINGST BARTEL
ARBITRATOR