

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

**CASE NO. 5160**

Heard in Calgary, April 8, 2025

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Locomotive Engineer Michael Sywak, PIN 163016, was assessed with 45 demerits for the main track authority violation (MTAV) violation, specifically failing to comply with CROR 302.3 and 85 while occupying mile 16.55 Hagersville subdivision while working on L50231- 28 on April 28, 2024.

**JOINT STATEMENT OF ISSUE:**

On April 28, 2024, the grievor was the Locomotive Engineer on Train L50231-28 from Sarnia to Garnet Yard. Mr. Sywak and his crew received an OCS clearance indicating "Protect Against Foreman Joseph Ismail working on the main track between /From Simpson Mile 5.7 Hagersville Sub to 3 Fires Mile 35".

The grievor and his crew passed a Foreman at the bridge at Mile 18, who asked the grievor for a track release once his movement cleared Mile 12.

Once the grievor had cleared the foreman, the grievor and his crew made an error and called the RTC to release the track from Mile 18 to 12. The crew contacted the RTC to advise they made an error and had not passed mile 12 yet. The grievor and his crew stated that were at about mile 15. The crew contacted the RTC one more time and indicated they were in fact at mile 16.55.

The grievor attended a formal investigation on May 04, 2024. On May 20, 2024, the grievor was served a CN Form 780 indicating an assessment of 45 demerits for the MTAV violation, specifically failing to comply with CROR 302.3 and 85 while occupying mile 16.55 Hagersville subdivision while working on L50231-28 on April 28, 2024.

**The Union's Position**

The TCRC made several objections, which included the following examples: the Notice to Appear was vague and did not mention the OCS Rules 301,302.1,302.2, 302.3 Rule 85 and the Hagersville Timetable, the Notice to Appear that was served initially differed from the one used in the statement. The present-day one was signed by a different Train Manager on a different date. The evidence package provided by the Company did not contain the audio tapes, and the Company requested that the employee bring in his electronic operating manual; the Rail Accident Report Form presented to the Grievor appeared to be missing the 3rd page, the TGBOs were missing a page, which included GBO's number 17 to 27, the audio tapes were finally provided, but had been edited, with no time stamp, and not all of the conversations with Foreman Lemieux or Ismail had been provided.

The Company noted all the objections, and the investigation would continue. The Union was provided with the tapes but would be forced to sign a confidentiality agreement for the copy. These are all violations of Article 71.1 of the Agreement.

The TCRC submits there were mitigating factors to consider in this instance. The 780 and the Notice to appear differ in their scope, which has prejudiced the grievor during and after the investigation since the grievor was not advised in writing about being investigated regarding non-compliance with CROR Rule 302.3 and was subsequently assessed discipline for it. The grievor took full responsibility for the error and made the attempt to rectify it by immediately calling the RTC once the crew was aware of the mistake. It was the grievor's first recorded instance of an OCS main track violation of this nature, and he has learned from his error. The grievor is an excellent employee who rarely takes time off and takes extra work when the Company is short of employees.

Furthermore, the TCRC reserves the right to allege a violation of, refer to, and/or rely upon any other provisions of the Collective Agreement and/ or any applicable statute, legislation, act, or policy.

The TCRC contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above to justify such a severe penalty. The TCRC contends the Grievor's discipline is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter, in particular the Grievor's tenure and record. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline and constitutes disciplinary discrimination (Conductor assessed 35 demerits for the same violation).

The TCRC requests that the Grievor's forty-five demerits be removed without loss of seniority, benefits, or pension and that he be made whole for all lost earnings with interest.

In the alternative, the TCRC requests that the penalty be mitigated as the Arbitrator sees fit.

#### The Company's Position

The Company disagrees with the Union's position. The Company conducted a fair and impartial investigation in accordance with Article 71. The Notice to appear must only provide enough information for the grievor to know the allegations against him, and need not cite specific rules. Further, the Company asserts that the Grievor was well aware of which rules were at issue in the investigation. The Company maintains that the grievor, and his Union Representative, were provided with the opportunity to know the allegations against him, he could review the content of the evidence, he had the opportunity to ask questions and was given a fair opportunity to provide rebuttal evidence in the grievor's defense.

The audio recording was provided to the grievor and Union at the time of the investigation and was offered a copy if they signed the Company release however as stated in the investigation, the Union declined to sign the release letter. The lapse of recording is based on the recordings related to the incident and all the Company relied on for the incident.

The grievor violated CROR 302.3 and 85 which caused an MTAV. The grievor lacked situational awareness. He deflected blame and did not take ownership of his mistake. The grievor has had past rule violations, including a CROR 439 violation, and the discipline issued was appropriate for such a serious incident.

**For the Union:**  
**(SGD.) M. Kernaghan**  
 General Chairperson

**For the Company:**  
**(SGD.) T. Sadhoo**  
 Manager Labour Relations

There appeared on behalf of the Company:

S. Vincent	– Counsel, Norton Rose Fullbright, Calgary
M. Salemi	– Manager, Labour Relations, Toronto

I. Perkins	– Senior Manager Investigations, Montreal
T. Sadhoo	– Manager, Labour Relations, Toronto
J. Secreti	– Articling Student, Norton Rose Fullbright, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
M. Kernaghan	– General Chairperson, LE-C, Trenton
C. Wright	– General Chairperson, LE-C, Barrie
D. Haynes	– Vice General Chairperson, Sarnia
M. Sywak	– Grievor

## **AWARD OF THE ARBITRATOR**

### **Facts, Issues & Summary**

[1] This is the second of three Grievances filed by the Union on behalf of this Grievor, which were heard at the April 2025 CROA Session. All three Grievances arose from events which occurred on April 28, 2024.

[2] The Grievor was employed as a Locomotive Engineer (“LE”) on the Company’s Eastern Lines, governed by Agreement 1.1. He entered Company service in 2012.

[3] At the time of these events, he therefore had approximately 12 years of service.

[4] On April 24, 2024, the Grievor was working with Conductor Couture, an employee of approximately two years of service.

[5] As all three Grievances arise from the same incident, the facts of this incident will be outlined in this Award, but will also apply to **CROA 5159** and **CROA 5161**. All cases are directed to be read together for any precedential use.

[6] It is not disputed the Grievor and Conductor Couture lost situational awareness and that a main track authority violation (“MTAV”) occurred. As noted in both Investigations, the Grievor and Conductor Couture had agreed between themselves that the Train was at a location where they were not in fact located, and that information was

then conveyed by Conductor Couture to the RTC and stated to be confirmed by the Grievor.

[7] As part of investigating the main track authority violation, the Company reviewed the Locomotive Voice and Video Recorder ("LVVR") footage.

[8] Conductor Couture was also disciplined and also grieved his discipline. Those grievances were heard by Arbitrator Cameron and resolved in **CROA 5136** and **CROA 5137**. Like the Grievor, Conductor Couture was assessed discipline both for the MTAV and for other misconduct seen on the LVVR, although for a different type of misconduct than that alleged against this Grievor (sleeping/assuming the position of sleep).

[9] In both the Conductor's and the Grievor's hearings, Mr. Ian Perkins provided testimony relating to the access of the LVVR for this incident and the same arguments were made regarding privacy and appropriateness of that access.

[10] Arbitrator Cameron's decisions were not issued by the time of the hearing. The parties committed to providing a copy of those decisions to this Arbitrator if they were issued before the resolve was issued for the Grievor's disputes, given the commonality of several issues.

[11] Arbitrator Cameron's decisions were in fact issued on May 8, 2025 and were therefore provided to this Arbitrator for her deliberations.

[12] The issue between the parties in this dispute is the appropriate measure of discipline for the MTAV. The Union also disputed whether a "*Track Release*" was given by this communication. Arbitrator Cameron has resolved this latter issue in **CROA 5136**

and found such a release was in fact given, on these facts. That issue has therefore been resolved.

[13] For the following reasons, the Grievance is upheld, in part. The discipline of 45 demerits was excessive on all of the facts, including a review of the discipline assessed to Conductor Couture, a two-year employee who received 10 demerits less than the Grievor.

[14] A penalty of 25 demerits is substituted as just and reasonable discipline.

### Applicable Rules

#### *CROR 85 Track Release Reports:*

- (a) The conductor will ensure the RTC is promptly advised of the time their movement has arrived, left or cleared a location or at a time specified by the RTC or after clearing the limits of the last proceed clearance for that subdivision.
- (b) Prior to making such report, the conductor must confirm with other crew members the accuracy of the information to be provided.
- (c) When a track release report is transmitted to the RTC, the RTC must, as it is transmitted, verify the movement identification and record the location into the computer assisted system. If correct the locomotive engineer must confirm correctness of the report to the RTC.

#### *CROR 302.3:*

- (a) Before a clearance is cancelled, the train or transfer addressed must be;
  - (i) clear of the limits;
  - (ii) protected by Form T GBO; or
  - (iii) within cautionary limits.
- (b) When a clearance is cancelled, the cancellation does not take effect until it has been acknowledged by the conductor and locomotive engineer. These employees must acknowledge by repeating the clearance number, "cancelled" and initials of the RTC to the RTC.

### Facts

[15] On April 28, 2024, the Grievor was working with Conductor Couture on a tour of duty on L50231-28, operating over three subdivisions: Strathroy, Dundas and Hagersville.

[16] The events at issue in this Grievance arose while the Train was being operated on the Hagersville Subdivision. The speed limit on the Hagersville Sub ranges between 10 mph and 25 mph.

[17] The Hagersville Subdivision is “dark territory”. This means it is controlled by a series of clearances and instructions provided by the RTC, rather than by signals. This is the case between MP 35.0 (Simpson) and 5.7 (Three Fires).

[18] On April 28, 2024, the crew was operating under OCS Clearance 6696. That Clearance was given at 07:29. It allowed them to proceed from Simpson to Three Fires. The crew was therefore traveling in descending mileage. The crew was also instructed to protect against Foreman Ishmael, who was working on “*main track*”.

[19] No mileage was given for Foreman Ishmael’s work in OCS Clearance 6696.

[20] At mile 18, at the bridge over the Grand River, the crew encountered a Foreman. The Foreman did not identify himself to the crew and neither did the crew ask his identity.

[21] The Foreman asked the crew to advise the RTC when they had cleared “his limits”, as noted in the Grievor’s Investigative interview (Q/A 13) and in that of Conductor Couture (Q/A 13). It was noted by Conductor Couture that the Foreman wanted the crew to “*release track to Mile 12 when it was clear so I could start work*” (Couture, Q/A 13). The Grievor described that the Foreman “*asked once we clear him on the bridge to call the RTC and tell them that we were clear of him*” (Q/A 13). The Grievor’s evidence as that “*[o]nce my counter indicated that we were clear of him on the bridge we toned the RTC and told them that we were indicated by the foreman to give you call and say when we*

*were clear of his limits*". The crew assumed it was Foreman Ishmael speaking with them, whom they were to protect against, as also noted in that Question.

[22] It was not. It was Foreman Lemieux. He did not yet have a permit for the track. Foreman Lemieux asked that the crew let the RTC know when they were passed mile 12, so he could work *behind them*.

[23] It must be recalled the crew was given no mileage for the work of Foreman Ishmael, at least at this point. A *later* Clearance – given at 09:29, after the disputed event occurred – noted that Foreman Ishmael was working between *mile 18 and mile 12*. Under the Clearance in place at the time of these events, however, Foreman Ishmael was simply working "*on the main track*".

[24] The Grievor's evidence was that he set his counter so he would know when his movement had cleared the bridge, and that when he cleared the bridge, he would consider he was out of that Foreman's "limits" (at Q/A 13).

[25] Conductor Couture contacted the RTC at 09:06. He had a conversation with the RTC for 47 seconds. This Arbitrator has reviewed that audio recording multiple times. Conductor Couture stated "*our entire movement is clear of mile 12 nought 9 nought 6 [0906] the Foreman has just asked me to give you a shout over*".

[26] The RTC was not simply told the movement was clear of mile 18 where the bridge was located, but was rather told the movement was clear of "mile 12". There is no explanation for why this crew felt that the bridge ended at mile 12 when it was located six miles earlier than that location, at mile 18.

[27] The Arbitrator confirmed the crew would have seen mile posts on this track as they were passed. Given the slow speed of the train, those posts should have been readily apparent.

[28] The RTC repeated the information and asked if the information was “*confirmed by the employee in control of the movement*”. That information was stated to be “*confirmed by the employee in control of the movement*”.

[29] While deliberating, this Arbitrator questioned the parties as to who this individual was, in this industry. As clarified by the parties, that employee was the LE.

[30] Conductor Couture was incorrect that the “*entire movement was clear of mile 12*” as communicated. The movement was not in fact “*entirely clear of mile 12*”, as mile 12 was still five miles ahead.

[31] It was the evidence of both Conductor Couture and the Grievor that they immediately realized the error in their mileage and tried to repeatedly call the RTC back, but she had left the channel. The video recording shows the LE saying “wait, RTC...” after this information is given.

[32] While the audio recordings were filed into this hearing, It is not clear from the evidence filed by the Company how much time passed between the first and second contact with the RTC, where the crew identified their mistake.

[33] The undisputed evidence therefore is that the crew corrected their mistake “*immediately*”. In the second contact, the Grievor stated that the previous information was in error and they were ‘*just coming up to mile 15*’. That information was in fact also inaccurate. When they were instructed to bring their Train to a stop by the RTC, they



stopped at mile 16.55, which would place them well in advance of mile 15 when they contacted the RTC again and received instructions to bring their movement to a stop, given that they were traveling in descending mileage. The crew contacted the RTC to correct that mileage.

[34] Both crew members were disciplined for the events of that day.

*The Grievances of Conductor Couture: **CROA 5136** and **CROA 5137***

[35] The Union filed two Grievances on Conductor Couture's behalf. Those Grievances were ultimately dismissed in **CROA 5136** and **5137**.

[36] Those Awards were issued on May 8, 2025, after this matter was heard, but before this Award was issued. As discussed with the parties at the hearing, if those decisions were issued during this Arbitrator's deliberations, they were to be provided, and those Awards have been reviewed in the course of these deliberations.

[37] The Company's discipline of 35 and 30 demerits to Conductor Couture for the MTAV and for "*sleeping/assuming the position of sleep*" for the bulk of 35 minutes were both upheld by the Arbitrator.

[38] There were identical issues raised by the Union on behalf of both crew members regarding the use of the LVVR in this situation. In both cases, that video evidence disclosed alleged issues in the cab which the Company has maintained caused or contributed to the loss of situational awareness and the MTAV, on behalf of each crew member.

[39] In Conductor Couture's case, that was sleeping/assuming the position of sleep, which Arbitrator Cameron found had been established. In the Grievor's case, this was

allegedly using a personal electronic device or personal entertainment device, which is addressed in the companion case of **CROA 5159**.

[40] The evidence of Mr. Perkins, the individual who was qualified to access the LVVR was given in both this hearing and also in that of Conductor Couture. His evidence was that the Company accessed the LVVR after May 3, 2024 – likely on May 4 or 6, 2024 - when it became aware Transport Canada would not be conducting an Investigation. He testified he had determined by that point that this was not an RTC failure or equipment or track failure and that the evidence therefore pointed to the crew making a mistake, given the crew had reported they were at mileage where they were not. He testified the Company believed it had met the requirements in the *Railway Safety Act* and Regulations to do so. His evidence was he therefore considered he had reason to believe that factors in the locomotive cab may have caused or contributed to the MTAV and could review the LVVR.

[41] Arbitrator Cameron has determined in **CROA 5137** that the Company was correct in that conclusion, on these facts. While the Union has argued before me that no “Track Release” request occurred, Arbitrator Cameron has specifically determined that Conductor Couture had requested a Track Release in this communication. For the same reasons as set out in that Award, I agree with that conclusion.

[42] Mr. Perkins’ evidence was that he would bring to management’s attention if he identified any threats on the video evidence, but he had no part in any discipline decision. In this case, he brought that evidence to management.

[43] The Grievor was provided notice on April 28, 2024 to attend an Investigation into the MTAV. This Notice was given *prior to* the Company’s review of the LVVR.

[44] The Grievor was Investigated for the MTAV on May 4, 2024 and was assessed 45 demerits for a main track authority violation (“MTAV”), in violation of CROR 302.3 and 85. That discipline was grieved and is the subject of this Award.

[45] After the discipline was assessed, the Grievor received coaching, confirmed by a letter. The letter itself is dated May 19, 2024, but refers to coaching on May 20, 2024, so that date must be in error. That coaching reviewed his disciplinary record of 45 demerits (from this incident), confirmed that dismissal occurred at 60 demerits, and noted he would be subject to *“increased monitoring and supervisory guidance of your behaviour”*.

[46] The letter also pointed out the “gravity” of the Grievor’s *“current situation”* given his disciplinary record.

[47] On May 19, 2024, the Grievor was then given a Notice to Attend an Investigation regarding an alleged violation of General Rule A(xii) relating to the use of a personal electronic/entertainment device while working on April 28, 2024, which was discovered on review of the LVVR.

[48] He was issued 30 demerits for that violation (the subject of **CROA 5159**) and was then dismissed for accumulation (the subject of **CROA 5161**).

### Decision

[49] All of the jurisprudence and evidence was carefully reviewed, however only that relevant to this Award will be specifically mentioned.

[50] It is not disputed that the crew lost situational awareness while operating under this Clearance on the Hagersville Sub. They thought they had cleared mile 12, and were

at that point at approximately mile 17. They reported to the RTC that they were clear of track they were still occupying.

[51] Maintaining situational awareness is a critical aspect of an LE's job, especially in "dark territory". Losing situational awareness is a significant and serious issue in this industry, capable of attracting significant discipline.

[52] Turning to the second and third *Wm. Scott & Co.* questions, the Company assessed 45 demerits for this incident. The Union contests that discipline was excessive. It was argued by the Union that there are mitigating factors at play which were not given sufficient consideration by the Company, including the encounter with Foreman Lemieux.

[53] The Union relied on **CROA 2303**. In that case, the Arbitrator felt the evidence fell short of the standard required to support there was a violation of the OCS clearance. That is not the case here. The Union also relied on **CROA 4050**, where the Grievor was reinstated without compensation. However, the Grievor in that case had 31 years of service, which the Arbitrator found was a "powerful mitigating factor".

[54] The Grievor does not have a similar level of service to offer in mitigation, although he does have 10 years more service than Conductor Couture.

[55] The most persuasive authority for the appropriate measure of discipline for this particular incident is that of Arbitrator Cameron in **CROA 5136**, given he was assessing the *same* incident as at issue in this case. He upheld the assessment of 35 demerits against Conductor Couture for this same incident. Conductor Couture was the individual communicating with the RTC. Both Conductor Couture and the Grievor gave the *exact*

*same* explanation in their Investigation - down to the word - that they both had agreed they were at mile 12 *before* the radio communication was made to the RTC.

[56] However, it is also the case that the crew *did* realize the information was incorrect themselves, and the evidence is the crew tried to call back “*immediately*” to report the incorrect mileage.

[57] The Union argued it was mitigating that the crew was confused, because they were to protect against Foreman Ishmael between mile 12 and mile 18. It argued that when they were contacted by a Foreman at mile 18, asking for release of their track once they cleared, the crew was then confused that they were at mile 12.

[58] However, the crew was not in fact required to protect against Foreman Ishmael *between mile 12 and 18* when they first contacted the RTC at 09:06. *That* instruction only came *after* these events, when they received a *new* Clearance from the RTC at 0926 (#6715). That was *after* it was determined their mistake was made; and after Foreman Ishmael’s whereabouts was located on the track.

[59] At 09:06, when they first contacted the RTC, they were to protect against Foreman Ishmael “*working on main track*”. No mileage was given. Therefore, even if there *were* some basis for the crew making the initial assumption that they had encountered Foreman Ishmael at the bridge, *that does not explain why the crew mistakenly believed that once they had cleared the bridge, they were then at mile 12.*

[60] That is the error in this case. While the Grievor stated he had “set his counter” so he would know when the Train had cleared the bridge, there was no explanation for why it was felt that *the bridge* - being a landmark on this Sub as noted by Arbitrator Cameron

- *was in fact at mile 12, when it was located at mile 18*. It was that loss of situational awareness that occurred and which does not have a credible explanation. That error is not explained by any issue with encountering an unexpected Foreman between miles 12 and 18, and I do not find that encounter to be mitigating.

[61] That said, the differing lengths of service as between the Grievor and Conductor Couture *should* have been considered by the Company to be a significant mitigating factor, operating in the Grievor's favour. I am satisfied it was not given the appropriate weight by the Company when it made its disciplinary choice.

[62] Conductor Couture had what was described by Arbitrator Cameron as a "previous safety discipline" (at para. 5) although it was not clear what that discipline was. Arbitrator Cameron does note Conductor Couture had only two years of service.

[63] The Grievor was assessed *10 additional demerits* than Conductor Couture for this same incident, *even though* he had 10 years greater service. While the Company focused on the Grievor's disciplinary record, in the past decade he had a previous Rule 439 violation in December of 2017, for which he received a suspension, and a run through switch in 2022, three years previously. Equating that to Conductor Couture, the Grievor had no safety disciplinary events for the last two years, while Conductor Couture had a previous "safety discipline" in that same two year period.

[64] Looking at his career wholistically, the Grievor was employed for 12 years. I cannot agree his disciplinary record is poor for that length of service, as argued by the Company, but that record is not particularly mitigating either. However, its length should have served to mitigate this penalty.

[65] Conductor Couture only had two years of service to place against his misconduct however, yet the Grievor was assessed 10 more demerits.

[66] I am therefore persuaded by the Union's arguments that the discipline is excessive. I am satisfied that given the Grievor's length of service, his level of discipline should have been less than that assessed to Conductor Couture.

[67] The Grievance is therefore upheld, in part. I am prepared to vacate the assessment of 45 demerits and substitute an assessment of *25 demerits* as just and reasonable discipline for this incident. Combined with the discipline upheld in **CROA 5159**, that placed the Grievor appropriately at 55 demerits in May of 2024.

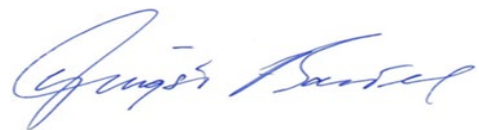
[68] As dismissal does not occur until 60 demerits are reached under the Brown System, the Grievor should not have been dismissed.

[69] The Grievor is therefore to be reinstated and to be made whole for any losses.

[70] With the Grievor's reinstatement, the issues which were to be addressed in **CROA 5161** have become moot. However, in the interests of good labour relations, those issues will also be addressed, in case this Arbitrator is found incorrect in either of **CROA 5159** or **5160**.

I reserve jurisdiction for any questions regarding remedy as noted above; for any questions regarding the implementation of this Award; to correct any errors; and to address any omissions to give it the intended effect.

**June 16, 2025**



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**CHERYL YINGST BARTEL**  
**ARBITRATOR**