CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5161

Heard in Calgary, April 8, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Locomotive Engineer Michael Sywak, PIN 163016

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 was involved in a main track authority violation (MTAV).

The grievor attended a formal investigation on May 23, 2024. On June 03, 2024, the grievor was served two CN Form 780s indicating an assessment of 30 demerits for "Circumstances surrounding your violation of General Rule A (XII) and GOI 8 – safe work procedures while using a personal electronic device and personal entertainment device while working L50231-28 on April 28, 2024". The grievor received a secondary form 780 issuing a discharge for "Circumstances surrounding your violation of General Rule A (XII) and GOI 8 – safe work procedures while using a personal electronic device and personal entertainment device while working L50231-28 on April 28, 2024".

The Union's Position

The TCRC made several objections, which included the following examples: objected to the investigation in its entirety as the video evidence was not complete, the TCRC did not receive the video, and there were significant lag times between 3 to 5 seconds of the audio and the video, the violation of the grievor's PIPEDA rights, the LVVR company policy, as well as the video recorder regulations, were not included in the Notice to Appear, no DTRS or CATS ticket were provided in the investigation to show what engines the grievor and his Conductor were operating and that they were on duty that day. The TCRC objected to the note at the bottom of the NTA, stating that the grievor was to bring his own EOM device to access Company rules or policies.

The Company noted all the objections, and the investigation would continue. These are violations of Article 71.1 of the Agreement.

The TCRC submits there were mitigating factors to consider in this instance. The Company has not put forth any reliable or compelling evidence to suggest that the grievor was culpable of these allegations to the point of discharge. The TCRC maintains that the Company has not exercised its rights reasonably as contemplated in Article 94 of the 1.1 agreement.

The grievor has been disciplined twice for the same alleged issue. Once receiving 30 demerits on June 03, 2024, and then receiving a discharge notification for the same alleged issue on the same date. The Company has no right to discipline an employee twice for the same alleged infraction. This should render the entire issue void ab initio, and he should be exonerated.

The grievor took full responsibility for his error. It was the grievor's first recorded instance of an alleged General Rule A violation of this nature, and he has learned from his mistake.

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. Employees who have found themselves in similar circumstances were afforded considerable leniency, receiving far less discipline.

The TCRC requests that the Grievor be reinstated 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. Firstly, the Company submits that the Grievor's discharge was warranted and appropriate in the circumstances. Further, the Grievor was discharged due to the accumulation of demerits in excess of 60 and despite the wording of the second 780, this fact was well-known to both the Grievor and the Union. The issuance of a discharge due to accumulation of demerits is in line with the Brown system of discipline and CN's discipline policy which both the grievor and Union are aware of.

The Company maintains that the grievor, and his Union Representative, were provided with: a notice to know the accusation against him, a review of all the evidence and a fair and impartial investigation. The investigation clearly established culpable behaviour which warranted a strong disciplinary response.

The grievor was not disciplined twice for the same instance, the grievor was only issued 30 demerits for the Rule A violation. The discharge was appropriate and any mitigating factors that may exist do not warrant a lesser penalty.

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

Background, Issue & Summary

[1] This is the third of three Grievances heard at the April 2025 CROA Session, involving this Grievor. The first two were resolved in **CROA 5159** and **5160**. The background to this dispute is as set out in those Awards.

[2] Given the finding in **CROA 5159** that the MTAV did not support an assessment of 45 demerits; and given the substitution of 25 demerits was found to be just and reasonable discipline, the Grievor only reached 55 demerits and was therefore reinstated.

[3] While that renders this question moot, this Award is being issued in the event this Arbitrator is found to be incorrect in either of those two assessments.

[4] The Union argued the issuance of the two Form 780's to this Grievor on June 3, 2024 results in "double jeopardy".

[5] For the reasons which follow, I cannot agree. Had it been necessary, this Grievance would have been dismissed.

Decision

[6] In this Grievance, the Union grieved that two Form 780's were improperly issued to the Grievor on June 3, 2024. It maintained that this resulted in the Grievor being disciplined twice for the same offence, which it maintained was improper as constituting "*double jeopardy*".

[7] The Union relied on *Torngait Services Inc. v. U.S.W., Local 6480* 2008 CarswellNfld 239. That authority described the rule against "*double jeopardy*" as one where "*an*

employer may not impose more than one penalty for the same offence" (at para. 20; as described in Brown & Beatty, *Canadian Labour Arbitration 4th edition*).

[8] As further described in that authority, the concern was that discipline would be imposed by one level of management and then a higher level of management would then change that initial decision for that same offence, and increase the discipline, offending the rule.

[9] That source also noted that the rule was *not* offended it "*two penalties were assessed for two different types of misconduct arising out of the same incident*" (at para. 20).

[10] Addendum 111 of Agreement 1.1 states the following:

> To resolve the issue of discipline, for the life of the collective agreement(s) or until otherwise mutually agreed, the Company will utilize the Brown discipline system and standards in accordance with past practices and jurisprudence.

[11] It was not disputed that under the Brown System, discharge occurs when 60 demerits are reached.

[12] The first Form 780 in this case assessed 30 demerits for the Grievor's use of his personal electronic/entertainment device, which discipline was upheld in **CROA 5159 (**first in CROA numbering, but the discipline was issued after the 45 demerits assessed in **CROA 5160**). It was signed on June 3, 2024. For "assessed discipline" it states: 30 demerits. Under "Active Discipline From Previous Offences" is listed "45" for demerits, which I am satisfied is the discipline that was at issue in **CROA 5160** for the MTAV. Under "Total Active Discipline" is listed "75 demerits", which represents the 30 demerits *added* to the previous 45 demerits from **CROA 5160**, to reach that total.

[13] The second Form 780 is also signed and dated June 3, 2024. It states the Grievor was assessed a “Discharge”. Under “Active discipline” it listed 75 demerits, and under Total Active demerits it listed “Discharge”. Under discipline assessed is “Discharge” and under the line for “Discharge” is the number “1”.

[14] Both forms also have the notice that “*Company policy provides that accumulation of sixty (60) demerit marks or more results in automatic dismissal from the Company’s service…”.*

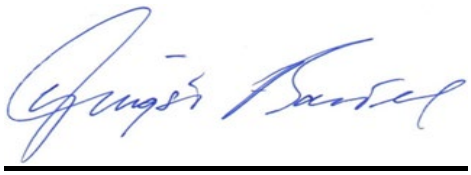
[15] The second Form 780 notified the Grievor of the fact that he had reached in excess of 60 demerits and was being “discharged”. However, he was not being discharged for the same offence as the issuance of 30 demerits (cell phone use). Rather, he was being discharged because when the demerits were issued to him for that discipline and added to his previous discipline, he had then “accumulated” over 60 under the Brown System, which then resulted in his dismissal.

[16] Given that dismissal under the Brown System was “automatic” once 60 demerits was reached, arguably the second Form 780 was not even required to be issued. However, I cannot agree that since it was issued, it was a second form of discipline *for the same incident* as was addressed in the first Form 780. It was not. It was discharge for accumulation. Neither can I agree that by notifying the Grievor this point had been reached, it offended the rule of “double jeopardy”. Rather, the second Form 780 carried out what the parties had *agreed* to in Addendum 111, which was that the Brown System would apply. That does not offend the rule against “double jeopardy”, but rather operationalizes what the parties have *agreed* would occur: discharge would result upon accumulation of 60 or more demerits.

[17] As the Grievor had amassed 75 demerits (at that time), the second Form 780 was appropriate notification to him of what the Collective Agreement itself dictated.

[18] Had it been necessary to determine, I would therefore have dismissed this Grievance and found the Company had not offended the rule against "*double jeopardy*" by issuing the second Form 780 noting the Grievor was "discharged".

I remain seized with jurisdiction to address any questions relating to the implementation of this Award; to correct any errors; and to address any omissions to give it the intended effect.



June 13, 2025

CHERYL YINGST BARTEL
ARBITRATOR