CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5164

Heard in Calgary, April 9, 2025

Concerning

VIA RAIL INC

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union is appealing the assessment of 30 demerit points to Locomotive engineer Jennifer Hendsbee for the unauthorized movement of train #15 on March 13th 2024.

JOINT STATEMENT OF ISSUE:

On March 13th 2024, the grievor was operating train #15 when the crew exceeded the limits of their OCS clearance. They had an authorization up to mile 55 of the New Castle subdivision and stopped their train at mile 61. Following a formal statement that took place on March 19, she was assessed 30 demerit points.

Union's Position:

The Union contends that the Corporation didn't consider the grievor's explanations and other mitigating factors surrounding the events that led to the rules violations when assessing the level of discipline. The Union feels that a more progressive approach should have been taken by the Corporation and that the level of discipline assessed should be reduced in order to better reflect the grievor's responsibility in the events.

Corporation's Position:

The Corporation does not agree as its investigation found that the crew was solely responsible for the unauthorized movement which occurred. While the crew may have had limited experience operating in OCS territory, it does not diminish the consequences their actions could have had. Furthermore, Ms. Hendsbee had been involved in another rule violation less than 6 months prior, demonstrating a concerning trend. Given this, the Corporation is of the opinion that the discipline is fully justified.

The Corporation refers to the response to the Step 3 Grievance. The Corporation further relies on the discipline letter, the formal investigation and all relevant circumstances.

The parties do not agree and wish to submit the dispute to arbitration.

For the Union:	**For the Company:**
(SGD.) J.M. Halle	**(SGD.) R. Coles**
General Chairperson	Specialist Director Employees Relations

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken, Montreal
T. Shannon-Drouin	– Senior Advisor, Employees Relations, Montreal
M. Coulombe	– Manager Train Operations East

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J.M. Halle	– General Chairperson, CTY-E, Levis
M. Meijer	– Vice Local Chairperson, Edmonton
J. Hendsbee	– Grievor, Halifax (via zoom)

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Grievor was hired January 16, 2023 as a Locomotive Engineer ("LE"), based in Moncton, New Brunswick.

[2] This is the first of two Grievances heard involving this Grievor, at the CROA April Session. This Grievance is against a 30-demerit assessment; the second Grievance – heard as **CROA 5165** – was filed against the assessment of 20 demerits and dismissal for accumulation.

[3] On March 13, 2024, the Grievor was working as the In-Charge LE ("ICLE") on Train #15, with LE Farrell, who was the Operating Engineer. The crew was authorized to proceed between Pacific Junction to mile 55 of the Newcastle subdivision.

[4] This territory is governed by "OCS" Rules. Under CROR Rule 301, movement in OCS territory is governed by a series of clearances, TOP, GOB and other instructions given by the RTC.

[5] This is also referred to in this industry as "Dark Territory".

[6] On March 13, 2024, Train #15 proceeded past its clearance. When the crew realized this error, they stopped at mile 61; engaged in the emergency protocol; and contacted VIA, as they were required to do. T

[7] he Grievor was Investigated and issued 30 demerits. She was also drug tested, with results being negative.

[8] This Grievance was filed against that assessment.

[9] Culpability is not in issue, the issues between the parties are threefold:

a. Does this Arbitrator have jurisdiction to consider the impact of the Grievor's mental health condition?

b. If so, does that evidence establish the Grievor's mental health condition was connected to the Grievor's actions in March of 2024?

c. Was a 30 demerit penalty just and reasonable discipline? and, if not,

d. What discipline should be substituted by an exercise of this Arbitrator's discretion?

[10] For the following reasons, the answers to these questions are:

a. This Arbitrator does not have jurisdiction to consider the Grievor's mental health condition as it was not raised in the JSI;

b. Even if that finding is incorrect, the evidence filed by the Union has not established the Grievor had a mental health issue connected to her misconduct at the time of these events; and

c. 30 demerits was a just and reasonable disciplinary penalty for exceeding limits of authority.

Facts

[11] An Investigation occurred on March 19, 2024. Both LE's provided evidence in the same Investigative interview.

[12] The Grievor's evidence was that the crew job briefed upon departure from Moncton and the OCS clearance was copied; that LE Farrell was speaking with the RTC regarding

the OCS clearance when she arrived at the cab; and that he gave her a copy of that clearance "*and we had a verbal briefing in regards to the limits*" (Q/A 18).

[13] When the crew entered OCS limits at Pacific Junction, her evidence was that a radio broadcast was made, with note of the OCS clearance to mile 55; and at mile 5, 15, 25 and 35, as required (on the "5's"). The Train was also required to stop at Rogersville, which had not been the original plan. Those instructions were given at mile 35.

[14] The Grievor's evidence was that the stop at Rogersville distracted the crew and that "*now all of our concentration had switched for the stop at Rogersville, ie. Braking spot, spotting the platform*" (Q/A 33).

[15] The Grievor's evidence was that after the stop at Rogersville, the crew briefed "*about the territory. We also briefed about the upcoming change in zone speed we were approaching (48.4)"* (Q/A 29). However, the crew did not confirm with each other the limits of their authority before commencing movement, after stopping at Rogersville, as required by Passenger Train Instructions (PTI) 8.10(a)(ii) (Q/A 30), nor did they discuss the clearances, as required by CROR Rule 142(b).

[16] No explanation was provided for not complying with the PTI *after* stopping at Rogersville.

[17] The Grievor's evidence was that her clearance was on the desk "*under a pile of papers"* (Q/A 35).

[18] LE Farrell also indicated the clearance was "*underneath my TGBO. We did a quick brief about 48.4 and just forgot to recheck my clearance*" (Q/A 40).

[19] The Grievor confirmed performing a radio broadcast at mile 45 and 55. The Grievor realized at mile 61 that the crew was outside of their OCS limits (Q/A 38).

[20] When asked how this occurred, the Grievor said "*I forgot. There are a couple of things I always do to remind myself but I did not do them* [reference to making certain notes] *... If I made these notes, I would have contacted the RTC at Rogersville*" (Q/A 40).

[21] When asked if she had anything to add, the Grievor expressed her remorse and committed to be "*very vigilant moving forward*"; she also expressed her apology and her understanding of the gravity of her actions; and expressed that she was thankful no one was injured and no damage occurred.

Arguments

[22] The Company's arguments are straightforward. It argued its measure of damages was appropriate for this serious offence. It argued this Office has confirmed in various decisions that 30 demerits or lengthy suspensions are appropriate for similar incidents, given that exceeding limits is recognized as a "*critical offence*". It argued that safety incidents such as this one were *"among the most serious of workplace offences*", especially for transit officers, carrying human cargo. It relied on the fact it took six miles for the crew to even recognize they were outside their limits; the Grievor's short service; her existing discipline record (20 demerits for a speeding incident less than six months earlier); and that the Grievor was working a commuter train, with passengers.

[23] While the Union recognized that Train #15 was in violation of Rule 302, it pointed out that at no point did the train violate any speed restrictions or engage in unsafe manoeuvres or train operations. It also noted it was "*mere feet from exiting the OCS track*

and entering the subdivision track" when the error was discovered. It noted the crew stopped the train and engaged in the appropriate emergency procedures. It pointed out the Grievor expressed her sincere remorse, and accepted responsibility. It argued that following the matters addressed in **CROA 5165**, which occurred in October of 2024, the Grievor sought a diagnosis of a potential mental health condition in November of 2024 and received a diagnosis of inattentive ADHD in January of 2025. It also argued she has commenced treatment. It argued that certain medical information relating to that diagnosis was only available April 7, 2025, shortly before this hearing, and that this post-discharge information was "*highly relevant*" to this discipline as shedding light on its reasonableness, as well as for that addressed in **CROA 5165**. It pointed out her appointment with the psychiatrist only occurred in March of 2025, which was after the JSI was filed. It also argued there were several mitigating factors (which were not included in the Investigative interview), including the pregnancy of the Grievor's daughter and the difficulties her daughter was having with her partner, necessitating them to come live with the Grievor.

[24] In its Reply, the Company argued that any arguments relating to a grievor's disability are to be included in the JSI, which did not occur, pointing out the limitations of an Arbitrator's jurisdiction in this process: **AH792**. It also argued the Union's documents do not establish a diagnosis; and the Grievor has not established she was not fit for duty.

[25] In its Reply, the Union pointed out that it did not have the medical documentation dated April 7, 2025 until that date, and that documentation established the Grievor has ADHD. It argued the symptoms of ADHD explained the Grievor's actions, as those symptoms included "*loses and/or misplaces items…is sidetracked by external or*

unimportant stimuli" and "makes thoughtless mistakes in tasks/activities". It argued this evidence "sheds light" on the reasonableness of this discipline.

Decision

[26] It is necessary to first address the Union's arguments regarding the Grievor's mental health and its impact on the discipline decision, if any.

[27] The parties' system of dispute resolution allows grievances to be heard in one hour, with multiple hearings each day of the three-day CROA session. The Investigation in large part creates the factual record for the Arbitrator, and in particular the Grievor's evidence and that of the crew. As recently noted by this Arbitrator, there are "trade-offs" to that efficiency.

[28] One of those trade-offs is the need for parties to agree on what issues are properly brought forward to Arbitration, in the JSI (or to set out those issues in an *ex parte* Statement of Interest, if given permission by the Arbitrator to proceed in that manner). This narrows the scope of the dispute and avoids surprises at the doorstep of a hearing. Both aspects support the efficiency of the CROA process.

[29] The parties have also agreed that a CROA Arbitrator is only given jurisdiction over those issues which are included in the JSI: CROA Memorandum of Agreement, Article 14.

[30] The parties have made this an issue of *jurisdiction*, and not an issue of whether *prejudice* has resulted from failure to raise an issue.

[31] Arbitrators working for this Office have consistently respected that limitation: See for example **SHP744** and **AH809-M.**

[32] Upon a close read of the JSI, the Company is correct that this issue is not included in that document. While the Grievor's "explanations" are referred to broadly, a possible disability was not included in those "explanations" which were given in the Investigation, or in the Grievance procedure documentation. I am persuaded by the argument of the Company that – by the parties' own agreement - as the Union did not make any reference to the issue of a disability in the JSI, this Arbitrator does not have jurisdiction to resolve that issue in this Award.

[33] As also noted in **AH809-M** "*arguments on mitigation of the penalty do not provide a gateway to add new issues to an arbitration*" (at para. 24).

[34] The Union argued that the evidence should be received regardless of this failure. It pointed out it was unaware of this issue, as the Grievor's diagnosis is very recent evidence. It noted the Grievor only sought help in November of 2024, 8 months after the events in this Grievance. The Union has argued the evidence serves to "*shed light on the reasonableness of the discipline*", as discussed by the Supreme Court of Canada in *Toronto (City) Board of Education* v. *O.S.S.T.F., District 15*[1].

[35] The Union relied on **AH663**, which was a case involving the consumption of drugs, termination and an alleged duty to accommodate, which raised the issue of post-termination evidence. It also relied on **CROA 4347**. In that case, it was found that CP knew or ought to have known of a drug addiction and also that the Grievor would argue that issue (for various reasons, including that addicts deny and hide their addictions) *and that questions about addiction were asked in the Investigation.*

[1] 1997 1 SCR 487

[36] The facts in this case are not similar to either of those cases. There is no suggestion in this case that *denial* is a component of the Grievor's mental health conditions, such that the Grievor was unaware of her condition until she hit "rock bottom" of her dismissal. There is also no suggestion that the Company knew – or ought to have known – that a medical issue would be raised.

[37] The further difficulty with this argument is that to rely on an issue of disability, there first must be medical evidence which would establish a connection *between* a medical condition and the misconduct at issue: **CROA 4653-4654**[2], even assuming a diagnosis is made. The burden is the Union's to both establish the disability and to make that connection.

[38] Like in **AH809-M**, even if I were mistaken on the issue of jurisdiction – described in that case as *"that essential procedural point which goes to the heart of the railway model's incredible efficiency*", (at para. 40) - a review of the evidence in this case does not demonstrate that the Union has met its burden. The Union has not established that the Grievor was suffering from a disability at the relevant time in March of 2024, which was capable of influencing her misconduct at that time.

[39] Upon reviewing the evidence, I am satisfied there was no such disability established for March of 2024.

[40] In its Reply, the Union provided documentation dated April 7, 2025 authored by a Nurse Practitioner, which states that the Grievor met "*inattentive criterion, but not hyperactive/impulse criterion, for the past 6 months*". The discipline in this case in fact

[2] See also the discussion of this issue in **AH663**, at pp. 20, 21

occurred more than six months previous to this documentation. It occurred 13 months earlier, in March of 202**4**. Given this date restriction, this evidence does not establish the Grievor was suffering from ADHD at the time of these events, *even if* it were accepted that a Nurse Practitioner can diagnose ADHD, which is not a foregone conclusion.

[41] The Union also filed an earlier letter dated January 20, 2025 from the same Nurse Practitioner, which stated that the Grievor was being referred to a psychiatrist for "*diagnostic clarity*". That letter specifically states that *"…a diagnosis of ADHD was not provided…*".

[42] After that, the Grievor then self-referred to the Nova Scotia Health Authority, Mental Health and Addictions Program. In a letter dated March 27, 2025, a Social Worker/Clinical Therapist noted that they were the first point of contact when self-referrals were made, to determine if further referrals were required. She referred to the results noted in the Grievor's earlier assessment, (the January 2025 letter), and completed a *further* assessment which showed *lower* test results.

[43] That assessment stated since the Grievor had been experiencing "*major life stressors"* those stressors were "*possibly contributing to the higher rate of depression and anxiety as reported by the results.* I am satisfied this is a reference to the earlier and higher results noted by the Nurse Practitioner, given they differed from the later results.

[44] The Union in its arguments discussed the Grievor's other life stressors regarding her daughter's pregnancy, which were weighing on her at the time.

[45] The Social Worker then stated: *Ms. Hendsbee agreed with the results of the assessment and as such, no further action was taken*" (emphasis added). No referral to a psychiatrist or medical doctor was made.

[46] Therefore, at least as of March 2025, there was no diagnosis of ADHD.

[47] The Union's evidence does not therefore serve to shed light on the reasonableness of this discipline, given that no diagnosis of a disability existed for the time period when this misconduct occurred, even if jurisdiction were assumed.

[48] The question of whether there is any distinction between a reliance on "*post-discipline*" evidence, as opposed to "*post termination*" evidence - which is the type of evidence discussed in *Toronto (City) Board of Education* v. *O.S.S.T.F., District 15* will be left to be decided another day.

[49] This case must therefore be decided on a disciplinary analysis, applying the familiar *Wm. Scott & Co.* framework.

Wm. Scott Questions

[50] Culpability is not in issue. This case raises the second and third questions from the *Re Wm. Scott* framework.

[51] This Office has recognized that a crew which exceeds the clearance it has been given commits a very serious and significant error. If a train exists where it is not supposed to be, it is not difficult to recognize the serious consequences that could occur. In the jurisprudence, such an error is described as "*extremely serious*" and a "*serious violation of a cardinal rule*" in **CROA 2936**; a "*serious breach of duty*" in **CROA 2053**; and a "*serious rules infraction*" in **CROA 2377**.

[52] In **CROA 2053**, a 25-year employee exceeded his limits by 1.78 miles. It was that employee's first time to take a new siding. The assessment of 45 demerits was reduced to 30 demerits.

[53] In **CROA 2377**, the grievor entered limits without authority, by 3.5 miles. His 45 demerits were reduced to 30 demerits also.

[54] This Office has also recognized that stakes are heightened when passengers are the cargo: see for example **CROA 3745**, which called this "very significant".

[55] The Company also provided several authorities involving suspensions, which are not as helpful, given a suspension was not issued in this case.

[56] The Union relied on **CROA 4583** where the grievor was initially dismissed for proceeding three miles into a Foreman's limits and not making the appropriate broadcast. In that case, the dismissal was set aside at arbitration and the grievor reinstated, but without compensation, resulting in a significant suspension or more than a year.

[57] This Grievor was responsible for making three errors which lead to this loss of situational awareness.

[58] First, she allowed her essential documentation to be buried under a pile of papers. Understanding what authority a crew has to operate in "dark territory" is an essential role of an LE. As an important document, it should never be buried under other papers.

[59] Second, the Grievor did not provide a credible explanation for why situational awareness was not gained when the "5's" were broadcast, which is part of the reason for that broadcast.

[60] Third, she was unable to provide a credible explanation for why the crew failed to take the required actions *after* the stop at Rogersville, which again was designed to aid the crew in maintaining their situational awareness.

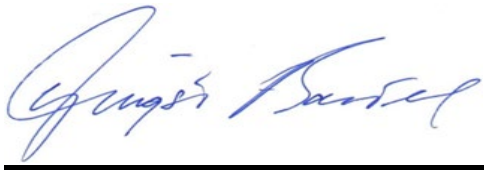
[61] Considering the various other factors under a *Wm. Scott* analysis, the Grievor's length of service is not mitigating, as she is a short-service employee. Her disciplinary record is not mitigating, as in her short career, she has already been assessed 20 demerits.

[62] The Grievor did take the steps she was required to take as soon as it was realized that the train had exceeded its limits and was transparent and honest. The crew did not try to hide its actions or otherwise deceive the RTC as to what had occurred, which stands to their credit. The Grievor's remorse was also sincere. It was also stated in argument that she had several life issues occurring at the time surrounding her daughter's pregnancy and a "no contact" order filed against her daughter's partner, although those issues were not mentioned in the Investigation.

[63] Upon consideration of all of the mitigating and aggravating factors and given the jurisprudence, I am drawn to the conclusion that the Company's assessment of 30 demerits for exceeding the limits of the clearance was just and reasonable discipline, in all of the circumstances and that this is not an appropriate case to exercise my discretion to reduce that penalty.

[64] Regrettably for this Grievor, the Grievance must be dismissed.

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



June 6, 2025

CHERYL YINGST BARTEL
ARBITRATOR