CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5165

Heard in Calgary, April 9, 2025

Concerning

VIA RAIL INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union is appealing the assessment of 20 demerit points issued to Locomotive Engineer Jennifer Hendsbee for operating a train without her tablet, as well as her subsequent dismissal due to the accumulation of demerit points.

JOINT STATEMENT OF ISSUE:

On October 11th and 12th 2024, the griever was working on train #15 and #14. Upon returning from that trip, the Corporation requested her to provide a formal statement concerning the fact she allegedly not complied with the acknowledgment of notices and bulletins in the Corporation's system prior to those tours of duty. On November 1st 2024, the Corporation imposed a disciplinary measure of 20 demerits and dismissed the grievor due to the accumulation of demerit points.

Union's Position:

The Union asserts that the Corporation failed to adequately consider the grievor's explanations and other mitigating factors related to the incident. The grievor acknowledged that she did not have her tablet, explaining that it was an oversight on her part and emphasizing that this was the first occurrence of such an issue.

The Union maintains that the grievor was not afforded a fair and impartial investigative process. The severity of the discipline imposed, along with its impact on her employment, suggests that the Corporation used this minor incident as a pretext to terminate her employment.

The Union argues that the discipline is unwarranted and should be expunged from the grievor's record. Furthermore, the Union requests that the grievor be reinstated to her position with full compensation for all losses incurred as a result of this action.

Corporation's Position:

The Corporation contends that Ms. Hendsbee failed in her duty by operating a train without reviewing several notices and bulletins before starting her journey. Additionally, during the same shift, she operated without her iPad, on the pretext that she could consult her colleague's device. Moreover, this event was the third incident related to a regulatory violation within a 13-month period for Ms. Hendsbee thus constituting a pattern and leading her to her dismissal. For these reasons, the corporation request that the grievance be dismissed.

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

For the Union:
(SGD.) J.M. Halle
General Chairperson

For the Company:
(SGD.) T. Shannon-Drouin
Senior Advisor 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 second of two Grievances heard in the April 2024 Session, regarding this Grievor.

[3] The first Grievance heard was filed against the assessment of 30 demerits for exceeding an OCS Clearance. That discipline was upheld as just and reasonable in **CROA 5164**. This resulted in the Grievor having amassed 50 demerits on her disciplinary record, as she had previously been assessed 20 demerits for speeding, on September 18, 2023.

[4] Seven months after the events in **CROA 5164**, the Grievor was assessed 20 demerits and dismissed for accumulation. It is that discipline which is at issue in this Grievance.

[5] Culpability is not in issue. The issues between the parties are:

a. Does this Arbitrator have jurisdiction to consider post-discharge evidence relating to the Grievor's mental health?
b. Was the assessment of 20 demerits just and reasonable?; and, if not
c. What discipline is reasonably substituted as just and reasonable by an exercise of this Arbitrator's discretion?

[6] For the reasons which follow, the Grievance is allowed, in part. The evidence relied upon by the Union does not meet its burden to establish the Grievor was suffered from a disability which impacted the Grievor's actions in this case.

[7] The assessment of 20 demerits is set aside and an assessment of 15 demerits is substituted. As the Grievor's record already stood at 50 demerits, that substitution does not alter the result that the Grievor stands dismissed for accumulation.

Facts

[8] The facts of this dispute are straightforward.

[9] On Friday October 11, 2024 and Saturday October 12, 2024, the Grievor operated Train #15 and Train #14 respectively.

[10] On those dates, she failed to sign in and synchronize with the Company's "app", "*Comply365*" whereby she would have reviewed and acknowledged she had read six weeks worth of notices and bulletins, before departure.

[11] This review and acknowledgement was required by PTI 7.9 and by CROR Rule 83(b) and was to occur prior to her tour of duty.

[12] In response to this Arbitrator's question, it was explained those bulletins could indicate such issues as track closures, a derail added to track, and general information regarding the Company's operations.

[13] As the Grievor had been off work for six weeks (her last tour of duty being August 31, 2024), there were 10 unread documents for her to review and to acknowledge having done so.

[14] The Grievor was Investigated on October 17, 2024.

[15] It was the Grievor's evidence that on October 11, 2024, she forgot her iPad at her daughter's residence, in Dartmouth, 2.5 hours away from Moncton. Her evidence was she took it out of her car so it would not get stolen. That iPad was how the Grievor was to access the bulletins and notices she was required to review.

[16] There was no evidence she reviewed that documentation in any other manner, such as borrowing a colleague's iPad to do so, prior to her tour of duty. There was also no evidence the Grievor contacted management to inform them she had forgotten her iPad and needed to review this material another way, although she was aware that "*relevant information pertaining to the safe handling of the train could've been provided in those notices and bulletins that were missed*" (Q/A 24).

[17] The Grievor also understood that by "*not acknowledging and familiarizing"* herself with the bulletins and notices, she had put herself*, "your coworkers, the passengers, and the public in general at risk*" (Q/A 28).

[18] When asked whether she complied with PTI 7.9, her evidence was "[*a]lways when I have my tablet with me, which is all the time, except for this last trip*" (Q/A 11).

[19] When asked if she had complied with Rule 83(b), her answer was "*Always when I have my tablet with me, which is all the time, except for this last trip*" (Q/A 25).

[20] When asked if she had complied with CROR General Rule A ii and iv, the Grievor answered "*Yes because there was a rule book, timetable, etc available to me during my tour of duty*" (Q/A 27).

[21] She also committed to having her iPad with her, fully charged in future, so she could acknowledge the information. She did not have anything further to add to her statement when questioned, such as an apology.

The Post-Discharge Evidence

[22] The Union raised an issue that the Grievor suffered from a mental health disorder of ADHD at the time of these events. That disability is referred to by name in this Award, as its nature is alleged to be relevant to the issues raised in this Grievance. The Company raised an objection that this Arbitrator did not have jurisdiction to consider the Grievor's disability, given the issue of the Grievor's mental health was not raised in the JSI. The Union argued this information could be reviewed by this Arbitrator, under the current state of the law as post-discharge evidence, as it served to "*shed light on the reasonableness"* of the Grievor's discipline. It also argued alternatively that the Union had not met its burden to establish the disability was relevant.

[23] The Union relied on **CROA 4347**. However, in that case, the Arbitrator recognized that the issue of the Grievor's disability was found to be a "live issue" before the parties, prior to the hearing, so it can be distinguished. The Arbitrator held that the Company "knew or ought to have known that the grievor may have suffered from an addiction, which would then trigger obligations under the *CHRA*".

[24] The Union also relied on **AH663**. In that case, the Arbitrator found that "*the evidence does not permanently crystallize as of the date of termination, particularly whether further evidence arises during the investigation and after the termination which demonstrates an employee suffered from a disability"* (at para. 76).

[25] It is the Union's burden to establish the Grievor had a disability at the relevant time which was capable of impacting her ability to perform the functions of her job. As in **AH663**, I am satisfied the evidence of the Union is simply insufficient to reach the point it has argued, as well as being internally contradictory.

[26] After her termination, the Grievor self-referred for assessment for a mental health disorder. She went to two different organizations. The first appointment was made in November of 2024 at Beyond Health/Beyond ADHD. At that organization, a Nurse Practitioner determined after performing an initial screening assessment that the Grievor needed a referral to a psychiatrist for "*diagnostic clarity*" and specifically ***declined*** to provide a diagnosis. She stated:

> I am writing to recommend the referral of Jenny Hendsbee to Psychiatry in the context of potential co-morbid ADHD and a mood disorder…As a result, following DSM-5 diagnostic guidelines, a diagnosis of ADHD was not provided in the context of a potential mood disorder. The results of the assessment were reviewed with Jenny at a follow up appointment. She expressed understanding and agreement with same. As such, I am recommending that Jenny be referred to Psychiatry for diagnostic clarity; given the complexity of her case and the potential overlap of symptoms, their specialized knowledge and expertise would be greatly beneficial in establishing the correct diagnosis and treatment plan (at p. 2)

[27] Meanwhile, the Grievor then self-referred herself to the second organization, which was an Addiction and Mental Health Program, for Nova Scotia, in March of 2025. She was initially screened at that organization by a Social Worker/Clinical Therapist.

[28] By letter dated March 27, 2025, *that* individual noted the Grievor's life stressors may have impacted her initial assessment, as certain tests were repeated and the Grievor's scores were lower. It was determined by that organization that no further action was required.

[29] The Grievor then booked a "Step 2 Diagnosis and Treatment" appointment with the same Nurse Practitioner she had seen previously, who recommended Psychiatric consultation. That booking for April 7, 2025 – shortly before this hearing - was confirmed four days later, on March 31, 2025. This time, the *same* Nurse Practitioner had changed her mind and provided a short letter dated April 7, 2025 and provided in the Union's Reply, that the Grievor now *did* qualify for a diagnosis of inattentive ADHD, for the six months prior to the date of that assessment.

[30] However, looking closely at this evidence, there are several challenges for the Union in using it to impact the Grievor's ability to perform her job obligations.

[31] The most obvious issue – as argued by the Company – was that there was no explanation of why this individual determined the Grievor qualified for this diagnosis in April of 2025 but had not so qualified in January of 2025, or why the Nurse Practitioner required "*diagnostic clarity*" from a Psychiatrist and declined to give a diagnosis in January of 2025, but was able to do so in April of 2025.

[32] It was also not clear whether the Grievor disclosed to this individual the assessment results she had just received several days earlier, from the Addiction and Mental Health Program, which had determined that - given her current test scores - no further action was required. That assessment was made by a "*Social Worker/Clinical Therapist*".

[33] It is unclear how this Nurse Practitioner determined she was *not* able to provide a diagnosis without the aid of a Psychiatrist in January of 2025, yet *was* able to do so in April of 2025, especially given that the Addiction and Mental Health Program's screening assessment came up with a *different* result on its testing, just a few days before, and determined that no further action was required. These assessments are competing and neither individual is a medical doctor or specialist psychiatrist.

[34] A further difficulty becomes apparent on close review of the letter itself. The letter is titled "*DSM-5 Criteria for Diagnosis ADHD*". It is not purported to be a medical report that is specific to the symptoms suffered by this Grievor. The April 7, 2025 letter does not serve to draw the needed connection between the Grievor's specific issues and the misconduct which occurred, given there is no clarity in the information as to *which* criteria the Grievor suffered from, and no specific *application* of that criteria to the Grievor. The letter is just a listing of the criteria from the DSM-5 ***without*** noting any specific symptoms experienced by the Grievor, or how the diagnosis would have impacted the Grievor's job duties. There is also no indication the Grievor ever saw a Psychiatrist in March of 2025, as argued by the Union. A diagnosis is simply stated at the end – without any evidence of or detail of any Psychiatric assistance to do so. The timeline listed of "*for the past 6 months*" would have just barely covered the events at issue in this Grievance, which took place in October of 2024.

[35] While the Union further argued the Grievor was undergoing treatment, and made representations in its Reply on the success of treatment for ADHD, no details of that treatment were in fact provided in any of the third party information, nor was any treatment noted to be required by any medical practitioners. The source of the Union's

information on what treatment was being undertaken – and the success rates for treatment - was unclear.

[36] The letter of April 7, 2025 was provided in the Union's Reply, after the JSI was filed and shortly before the matter was heard in the CROA April Session. The timing of this change of heart by the Nurse Practitioner is confusing. Coming as it does directly on the heels of a *contrary* result reached by the Addiction and Mental Health Program, the Union cannot meet its burden to establish the Grievor had a disability which was capable of influencing her various actions in October of 2024.

[37] Given these issues with this evidence, I cannot agree that the bare information of a diagnosis made by a Nurse Practitioner, on these facts meets the evidentiary burden on the Union to establish the disability and how it impacted the Grievor's actions or inaction. Without that connection, this Arbitrator cannot find any relevance in this medical information for the events at issue.

[38] It must also be remembered that the issue raised by these facts is not only limited to the Grievor's forgetfulness relating to her iPad. When that occurred, the evidence is the Grievor then failed to then take any other steps to become aware of the information in the missing bulletins and notices from her six week absence, even though she acknowledged the importance of having this information. There was no evidence she ever reviewed this information over the course of these two shifts, for example. Neither did she ask management what she should do, to review that information some other way. Her forgetfulness is therefore only one aspect of her culpable misconduct. Her failure to take any steps to become familiar with this missing information - when she was

required to have that knowledge prior to her tour of duty – violated her obligations and is culpable misconduct.

The Wm. Scott Questions

[39] Culpability is not in issue. The questions remaining between these parties from the familiar *Re Wm. Scott* framework are a) whether the discipline was just and reasonable?; and b) if not, what discipline should be substituted?

[40] Turning to that assessment, the Company argued that its discipline was fair and reasonable; the Union that it was not. Both parties were frank that a similar situation could not be located in the jurisprudence, regarding a failure to acknowledge Bulletins and Notices. The only jurisprudence that could be located was **CROA 3902**, where 15 demerits were issued to a grievor who did not have an up-to-date rule book, during the course of an efficiency test. That discipline was upheld as the Arbitrator found a violation of General Rule A (ii) had occurred.

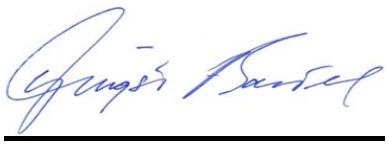
[41] In this case, I am satisfied that the Grievor was culpable not just for forgetting her iPad, but also for not taking any proactive steps to advise the Company she had been unable to do so, so that information could be given to her some other way. There was in fact no evidence she *ever* became aware of this information prior to her two tours of duty, although she acknowledged the importance of this information in the Investigation. She failed to take any steps to make herself aware of this information prior to her tours of duty, as she was required to do, and instead continued on as if that information did not exist. That was a dangerous course of action.

[42] While the Union noted it was trying to find a manner in which this individual could continue her career, it must be recalled that the events assessed in CROA 5164 and 5165 would not – together – have resulted in the Grievor's dismissal, had she not already had 20 demerits on her disciplinary record for speeding. Despite the Union's able arguments, the Grievor's employment was very precarious in October of 2024. The Grievor is also a short-service employee so does not have service which could act as mitigating.

[43] While I am satisfied that 20 demerits was not a just and reasonable penalty for what occurred in this case, unless this discipline were set *below 10* demerits, the Grievor would still be dismissed for accumulation. Given that forgetting her iPad was not the only culpable behaviour but merely the beginning of a course of action which resulted in the Grievor being unaware of six weeks' worth of bulletins and notices for two tours of duty, I cannot agree that *less than* 10 demerits would represents a just and reasonable penalty. While I am prepared to substitute a penalty of 15 demerits for this misconduct, unfortunately for this Grievor that still results in her dismissal, given the already precarious state of her discipline record.

[44] The Grievance is upheld in part. However, the Grievor remains dismissed.

I remain seized with jurisdiction to address any questions regarding the implementation of this Award; to correct any errors; and to address any submissions to give this Award the intended force and effect.



June 6, 2025

CHERYL YINGST BARTEL
ARBITRATOR