

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

CASE NO. 5201

Heard in Edmonton, July 10, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issue in dispute is the 40-day suspension issued to Mr. Craig Lyttle.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Lyttle was assessed with a 40-day suspension on August 2, 2024. As part of the Company's conclusion to its investigation, the Form 104 stated in part:

"Your alleged rule violation of shoving equipment on non-main track, more specifically failing to protect the point while shoving equipment in Walkerville JCT on June 30, 2024."

A formal investigation was conducted on July 5, 2024, to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that, investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- Rulebook for Train & Engine Employees Section 12.3, 2.2

In consideration of the decision stated above, you are hereby assessed with a forty (40) day suspension."

Union Position:

The Union reserves its right on its positions made throughout correspondence and grievances. The Union will not duplicate all arguments presented in grievances and correspondence but relies on them. The Union stands by all of its positions put forth. The Union reserves its rights to object and respond to any new positions presented by the Company.

On June 30, 2024, Locomotive Engineer Craig Lyttle supervised a reverse movement at London Terminal. The movement was performed by a trainee, while the conductor, positioned at the rear, was responsible for point protection under CROR Rule 12.3. Superintendent Smith, observing from a limited vantage point, alleged the train was "shoving blind" and ordered D&A testing of Mr. Lyttle, despite no observable signs of impairment and after further movements had occurred. The test returned negative. A Notice of Investigation was issued on July 10, 2024, followed by a formal investigation on July 15, during which Superintendent Smith testified as a witness and author of a memorandum, while the conductor confirmed full visibility of the movement. On August 2, 2024, Mr. Lyttle was issued a Form 104 imposing a 40-day suspension for alleged violations of Rules 12.3 and 2.2.

This sequence of events gives rise to serious procedural concerns, and without limiting the generality of our arguments, the Union asserts the following:

1. Responsibility for Rule 12.3 Rests with the Conductor

CROR Rule 12.3 assigns responsibility for protecting the point of movement to the qualified employee at the tail end — in this case, the conductor. Mr. Lyttle, as locomotive engineer, was situated 7,000 feet away in the lead cab and had no line of sight to the point.

Per the rule, a crew member must:

- Observe the track;
- Ensure it is clear;
- Maintain radio contact with the engineer.

Q&A 37 of the investigation confirmed that Conductor Heffernan maintained 100% visibility and issued clear instructions. The reverse movement was conducted under direction that complied with CROR 12.3. Mr. Lyttle, following the properly confirmed radio instructions, did not act negligently, nor did he violate the rule.

1. Conflict of Interest and Procedural Irregularities

Superintendent Smith:

- Witnessed the incident;
- Authored a memo and gave testimony (Q&A 36);
- Imposed the discipline via Form 104;
- Authored the Company's Step 1 grievance response.

Such overlapping roles violate the principles of neutrality and procedural fairness under Article 39.05 of the Collective Agreement and supporting CROA jurisprudence (e.g., CROA 4712). A fair and impartial investigation is not just contractual — it is a cornerstone of administrative justice in Labour arbitration.

3. Arbitrary and Unfounded D&A Testing

After allowing the job to continue working/switching for several more moves in the yard despite the alleged infraction Smith ordered drug and alcohol testing. However:

- No observable signs of impairment were cited;
- The testing was conducted after multiple additional train movements;
- The result was negative.

According to CROA 5068, suspicion-based testing must be based on immediate and observable impairment. When a clean test result follows an order made in absence of observable grounds, it supports the conclusion that the testing was retaliatory or punitive. This constitutes a breach of:

- Mr. Lyttle's privacy and dignity;
- Procedural obligations under CP's own policies;
- The standards established in arbitral jurisprudence for suspicion-based testing.

2. Entrapment-Style Oversight

Superintendent Smith positioned himself in a location where he could not fully observe the conductor's actions but nonetheless concluded a rule violation had occurred. The conductor, whose movements were outside Smith's line of sight, confirmed full compliance with CROR Rule 12.3, including visibility, point protection and radio communication.

While the Union does not assert deliberate entrapment, the circumstances raise a legitimate concern that the allegations were based on partial observations, leading to a procedurally unfair conclusion. These concerns form part of the Union's broader objection to the neutrality and fairness of the Company's handling of this matter.

3. Disproportionate and Harmful Discipline

The imposition of a 40-day unpaid suspension is excessive, especially given:

- Mr. Lyttle's long and mostly distinguished career;

- The unclear basis for the rule violation;
- No incident occurred with the reverse movement;
- The punitive impact on Mr. Lyttle's income, pension, and family.

Arbitral law emphasizes progressive discipline and proportionality. Disciplinary penalties must reflect the gravity of the infraction, the employee's past record, and the likelihood of rehabilitation.

6.Preservation of Disciplinary Context

The Union maintains that the 40-day suspension imposed for the June 30, 2024, reverse movement should be regarded as a discrete disciplinary action. It is the Union's position that the subsequent dismissal—arising from a separate incident involving brake test procedures—did not follow discipline specific to that conduct. Without prejudice to either party's arguments in the dismissal grievance, the Union respectfully reserves its position in this regard.

Rebuttal to Company's Step 2 Response

- Integrated Disciplinary Context - The discipline and D&A testing are inseparable, both stemming from the same alleged incident. As such, the Union's objection encompasses the Company's entire response to the event.
- Procedural Fairness - As outlined, Superintendent Smith's overlapping roles compromised neutrality and procedural integrity, contrary to Article 39.05 and CROA jurisprudence. The Union maintains this objection.
- Improper Testing and Oversight - The D&A testing lacked immediate, observable grounds and was ordered only after the crew continued operations. The negative result confirmed no impairment. This supports the Union's position that the testing was punitive and unsupported, consistent with CROA 5068.
- Damages Claim Affirmed - The Union reaffirms its request for damages in light of the unjustified intrusion on privacy and professional dignity.

Conclusion and Requested Remedy

Submitted in good faith, the Union respectfully defers to the Arbitrator's discretion in determining an appropriate outcome and accordingly seeks the following remedies to make Mr. Lyttle whole:

- (a) Expungement of Discipline:
 - Immediate removal of the 40-day suspension from Mr. Lyttle's employment record.
- (b) Restitution of Lost Wages and Benefits:
 - Compensation for 40 days of lost earnings, including regular wages, overtime, pension contributions, and associated benefits.
3. Damages for Wrongful D&A Testing
 - An award of \$10,000 to address the breach of privacy, emotional distress, and reputational harm resulting from the unjustified testing.
4. Punitive Damages
 - An additional \$5,000 to deter future misuse of D&A testing protocols and reinforce compliance with established workplace standards.

Any Further or alternative relief as the Arbitrator deems just and equitable in light of the facts and governing arbitral principles.

Company Preliminary Objection:

The Union has attempted to arbitrarily consolidate and bundle multiple disputes. More specifically, the employee's assessment of discipline for the incident and whether there was cause to perform a post-incident A&D test.

The Company maintains the sole issue in dispute is the assessment of a 40 day suspension. As such any other violations brought forth by the Union are not properly before the Arbitrator. Without precedent or prejudice to the Company's position, the Company will endeavor to respond to the Union's additional allegations.

Company Position:

The Company disagrees with the Union's position.

The Union asserts that the Grievor was not afforded a fair and impartial investigation in accordance with the collective agreement. Specifically, the Union claims Superintendent Smith's role violates the principles of fair and impartial investigation. Not once did the Union or the Grievor object to Superintendent Smith's role throughout the investigation nor has the Union provided any rationale to support its position that the investigation was not fair or impartial. Company maintains such objection is not timely. For the Union to only now raise these concerns is contrary to the principles of Labour relations and arbitral jurisprudence regarding lying in the bushes with respect to procedural objections. In addition, the Union is incorrect in their characterization of the Superintendent's role.

The Company objects to the Union reference to the Canada Labour Code (CLC) in relation to the fairness and impartiality of the investigation process. The Union has not provided any evidence to support such a claim, nor do they state how the Company has violated the CLC.

The Company maintains that following the fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104. The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor.

The Company disagrees with the allegation of entrapment. The Superintendent was carrying out his normal managerial duties when he identified the serious safety concern. To characterize the Superintendent's conduct as the Union has without facts to support such a claim demonstrates that the allegation is without merit.

Notwithstanding the Company's preliminary objection, the results of a post-incident A&D test do not support the Union's position with respect whether there were any procedural flaws in the investigative process. The incident was a serious safety infraction and the Company followed its A&D Policy and Procedure. Moreover, the Company disagrees that there was the A&D test was retaliatory in any way. The Union has not provided any evidence or argument to support such a characterization.

The Company's decision to request the Grievor submit to post incident substance testing was reasonable and just in all the circumstances including that the request was in line with Company Policy.

With respect to the Union's claim for damages, the Union has provided no rationale in support of its claim. Damages are reserved for conduct, which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment. As the Union has failed to allege such conduct on behalf of the Company or supply sufficient details to support such an allegation, the Company maintains the request for damages is without merit.

The Company's position is that the discipline assessed was appropriate, warranted and just in all the circumstances. Discipline was determined following a review of all factors, including those the Union describes. The Company maintains that the discipline was properly assessed under the Company's Hybrid Discipline and Accountability Guideline.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

For the Union:
(SGD.) J. Bishop
 General Chairperson

For the Company:
(SGD.) F. Billings
 Director Labour Relations

There appeared on behalf of the Company:

S. Oliver	– Manager Labour Relations, Calgary
S. Scott	– Manager Labour Relations. Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Bishop	– Vice General Chairperson, LE-E, Severn
P. Boucher	– National President, TCRC, Ottawa

AWARD OF THE ARBITRATOR

Background, Issue & Summary

- [1] The Grievor is employed as a Locomotive Engineer (“LE”). He was hired in 1997 and has been qualified as a Locomotive Engineer since 2005.
- [2] On June 30, 2024, he was the LE on H97/98. On that assignment, he was working with Conductor Heffernan and a Locomotive Engineer Trainer (“ET”), whom he had worked with for approximately 20 shifts.
- [3] The Company alleged that on that day, the crew was observed by Superintendent Smith performing a reverse shoving movement on non-main track. It was alleged they did so “*blind*”, in contravention of Rule 12.3.
- [4] On July 5, 2024, the Company held two Investigations of the Grievor. One commenced at 12:00; the other commenced at 12:30. The Company also held two Investigations of the Conductor. The first was held on July 5, 2024. The second was held on July 17, 2024.
- [5] On August 2, 2024, the Grievor was issued a Form 104. He was assessed a 40 day suspension for violating Rule 12.3 and 2.2 of the Rule Book for T&E Employees, for failing to protect the point and failing to ensure the movement was safe.
- [6] Several preliminary issues were raised, by both parties.
- [7] The issues are:
 - a. Was the Union entitled to rely on the fact this was an E-Test?
 - b. Has the Union improperly consolidated two grievances?
 - c. Was the Investigation process unfair and partial given the involvement of Superintendent Smith?

- d. Has the Company failed to comply with the timelines for discipline in Article 39.05?
- e. Was the Grievor culpable for failing to protect the point?
- f. If so, was the discipline of a 40 day suspension a just and reasonable response? and
- g. If not, what discipline is appropriately substituted to reach that result?

[8] For the following reasons,

- a. The E-Testing framework is a legal analysis which flows from a finding of fact. As E-Testing occurred in this case, that framework is applicable;
- b. The Union has not improperly consolidated two grievances;
- c. The Investigation was not unfair or partial given the involvement of Superintendent Smith;
- d. The Grievor failed the E-Test by not confirming the point was protected;
- e. However, the Company failed to comply with the timelines of Article 39.05 and the discipline cannot therefore stand;
- f. The Grievor should have been coached/mentored/education under the E-Testing process for the E-Test fail.

[9] The Grievance is upheld. The 40 day suspension is vacated.

Disputed Provisions

RULE 12.3:

On non-main track, when equipment is shoved by an engine or is headed by an unmanned remotely controlled engine:

- (i) unless the portion of track to be used is known to be clear, a crew member must be on the leading piece of equipment or on the ground, in a position to observe the track to be used and to give signals or instructions necessary to control the move. Employees are prohibited from engaging in unrelated tasks while providing shove protection, and from providing shove protection from within a vehicle; and
- (ii) unless the unmanned engine is leading, and all rules applicable to public crossings for headlights, whistles and bells, are complied with at all crossings, such movement

must not approach to within 100 feet of any crossing unless such crossings are manually protected until the crossing is fully occupied; or in the case of a protected crossing, a crew member is on the leading car to warn persons standing on, or crossing, or about to cross the track.

- (a) In paragraph (a), "the portion of track to be used is known to be clear" only when a qualified employee:
- (i) can observe the portion of track to be used and has radio contact with the locomotive engineer; and
 - (ii) sees the portion of track to be used as being clear and remaining clear of:
 - equipment;
 - a red or blue signal between the rails;
 - track units; and
 - derails and switches not properly lined for the movement.
 - (iii) sees the portion of track to be used as having sufficient room to contain equipment being shoved.

When a non-main track that has been seen to be clear and no access to that track is possible by another movement, the track may be considered as "known to be clear". When it can be confirmed that other movements are not on duty or will not be performing work in the non-main track to be used, the requirement of "known to be clear" of equipment can be considered to be fulfilled continuously.

Collective Agreement Article 25.26(3):

An Engineer Trainee will assume control of the locomotive under the supervision of an Engineer-Instructor. When an Engineer Trainee assumes control of the locomotive and/or train the Engineer-Instructor will have their responsibilities relaxed to the extent that they will not be held responsible for broken knuckles, damaged drawbars or rough handling; they will, however, continue to be held responsible for the observance of operating rules, special instructions and other regulations.

Analysis & Decision

Facts

[10] The arguments of the parties are incorporated into this analysis.

- [11] Given that it was the Conductor who gave information to the Grievor for this reverse shove, the information he was aware of is relevant to the Grievor's discipline.
- [12] The Grievor's evidence is that he heard "*one brake free, extras checked, good for 80 cars, back up to Vacis*" (Q/A 7). The Conductor's evidence was that had communicated to the Grievor, via radio to "*cancel 3-point; one off, two checked, got room for 80 cars, back to clear Vacis*".
- [13] When asked why there was no one riding the point, the Grievor confirmed what instruction was given from the Conductor, and that his Engineer Trainee confirmed the instructions as correct (Q/A 17).
- [14] When asked how he knew the track was "*known to be clear*", the Grievor stated "*I cannot determine that, I can only go by what my conductor said, that I was good for 80 cars. That is the conductor's job to determine that the track [sic] known to be clear*" (Q/A 21).
- [15] At Q/A 17 of his first Investigation ("#1"), the Conductor confirmed he observed his movement "*on the ground*". As such, he was required by Rule 12.3 to know that the track was "*clear*".
- [16] His evidence was that he had job briefed with Train 231, and confirmed they would not be making a move "*inside of Walkerville Junction*" (Q/A 6; #1).
- [17] At Q/A 18 (Investigation #1), he stated he "*observed my movement on the ground, at the last place I secured a hitch, and that the track was known to be clear, therefore there was no need to ride the point*". At Q/A 21 (#1), when asked how he knew the track was "*known to be clear*", the Conductor stated that
- I was able to observe the portion of the track to be used, I was able to see while standing at the joint it was clear of equipment, I saw no equipment, I saw no red or blue signals, I saw no track unit moving or in the vicinity and I saw no switches not properly lined. And I knew we had sufficient room
- [18] At Q/A 30 (#1), he was asked how – if he was positioned 3000 feet from the switches that were being operated over, he could confirm the switch points were lined, and "*no flags had gone up at the access point*". He stated:
- First thing, from where I was standing, I could see that the switches were normalled, I had previously travelled over them and checked the points and confirmed they were lined for your movement. I was able to see the port of track used, and it was a clear day, and the sun was out, with no obstructions.

- [19] At Q/A 25 (#1), the Conductor stated that he could *“sufficiently see the Pellette crossovers and had just previously travelled over them roughly 10 minutes prior”*.
- [20] Superintendent Smith’s evidence in his Memorandum that he *“went to the Pellette crossovers”*. He does not in his Memorandum provide any distances of *where* he was standing in relation to those crossovers. Neither were these details elicited from Superintendent Smith during his questioning in the Investigation.
- [21] At Q/A 37 of the Grievor’s first Investigation, Conductor Heffernan confirmed his instructions and also confirmed he was *“100%”* in a position to *“see the portion of track to be occupied and stop the movement if needed”*.
- [22] At Q/A 31, the Conductor was asked *“From your vantage point, were you able to see Superintendent Smith that was standing at the crossover switches observing your movement go by”*? His answer was *“I was not on the lookout for any people near tracks, I was just following the rule”*. At Q/A 32 (#1), he stated he was *“on the lookout for red flags and switches not lined, and any other equipment. I could have stopped the movement just as quick from my vantage point just as easily if I were riding the point”*.
- [23] The Conductor’s evidence was the crew was in compliance with Rule 12.3 and he would not have done anything differently, and that it was as safe as riding the point that day. The Grievor’s evidence was he also felt the crew was in compliance with Rule 12.3
- [24] Two Investigations were conducted of both employees.
- [25] In the Grievor’s Investigation, the first 1 to 35 questions are the same.
- [26] If the Company were conducting a Supplemental Investigation as it maintained, it is very unusual that it would ask the first 35 questions exactly the same.
- [27] The Company then asks Superintendent Smith to *“confirm”* his memo and that he *“stands by”* those statements (at Q/A 36). That is the only difference between those Investigations.
- [28] This second Investigation was unnecessary. The Superintendent’s memo had already been filed as evidence in the First Investigation. In this process, it need not be *“confirmed”*.

- [29] In the Conductor's second Investigation ("#2"), the first 41 questions and answers are identical to the first investigation 12 days before.
- [30] At Q/A 42, there is a reference to the Conductor's previous statement at Q/A 21 (answer reproduced above).
- [31] The Conductor was then asked why he was ...*"unable to see Supt. Smith standing beside the switch"*? His answer was: *"As per my answer from Question 31, I was not on the lookout for any people near the tracks, I was just following the rule. I do not recall if I could see Supt. Smith"* (emphasis added).
- [32] He was also asked in Q/A 43 how he could see the targets, but not Supt. Smith, standing in *"hi vis"* by the tracks. His answer was
- I have no idea where he was standing. And then I was not on the look out for any person as per T&E Rulebook T-20 No qualified employee should be in any position to create an incident or near miss. If Mr. Smith was in fact in a position that required my immediate attention, it is in fact him in violation of the rules, not me, as I am not required to look out for people as per the rule. And employees are not allowed to be standing within 100' of a switch.*
- [33] In fact, there was no evidence from Superintendent Smith – whether in his Memo or at the Investigation - of *where* Superintendent Smith was standing.
- [34] The Company maintained in argument that the evidence of the Conductor was that he could not see Superintendent Smith, so he could not know the track was clear. However, as noted from the evidence recital set out above, that is overstating the Conductor's precise evidence.
- [35] The Conductor did not state that he did *not* see Superintendent Smith, only that he did not recall where Superintendent Smith may have been standing. The Company has not established *how close* Supt. Smith was in fact standing to the track, to establish that his presence could have interfered with a track being *"clear"*. That evidence is simply lacking.
- [36] Regarding the radio communication, Superintendent Smith admitted there was radio interference and there was a portion of the radio communication that was unclear.
- [37] I am satisfied Superintendent Smith did not hear all of what was said. I am satisfied the Conductor's evidence was that had communicated to the Grievor, via radio to *"cancel 3-point; one off, two checked, got room for 80 cars, back to*

clear Vacis". That information was confirmed as heard by the Grievor, who stated that he was satisfied the Conductor would not have given that direction if he did not know the track was "*clear*".

- [38] Superintendent Smith considered the Grievor was in contravention of Rule 12.3 and 2.2 of the T&E Rulebook applicable to the Grievor. The Company also relied on Rule 4.2 "Communication" at the hearing, but that Rule was not referred to in the JSI.

Analysis

- [39] The Company bears the burden to establish *culpability* for discipline, which is the first question in the *Wm. Scott* framework. The second and third questions – which involve the proper measure of discipline – do not arise unless culpability is first established.
- [40] As noted above, there were several preliminary issues raised by both parties.
- [41] Given the impact of a breach of Article 39.05 on this discipline, this issue will be considered first.

Has the Company Breached Article 39.05?

- [42] In the expedited arbitration process overseen by this Office, the Investigation process holds an importance which is unmatched in other industries. Combined with the Grievance Procedure, the Investigation process serves to create the evidentiary record for the Arbitrator, given that witness evidence in this process is rare.
- [43] Having a factual record created by the parties allows multiple cases to be heard each day of the three-day monthly CROA session, which gains considerable efficiencies for the parties, in resolving their disputes.
- [44] However, it is also well-accepted by Arbitrators in this industry and appointed by this Office that - given its importance - the Investigation process must be conducted in a manner which is both fair and impartial: **CROA 4866**. Both the Collective Agreement and arbitral jurisprudence have developed the elements of such a process.
- [45] The Collective Agreement in Article 39.05 states:
- Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be

required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed (emphasis added).

- [46] The notification provisions of the Collective Agreement are mandatory.
- [47] While the Union argued this mandatory nature was noted in **AH798** and **CROA 4072**, that conclusion is easily apparent from the wording of the clause itself, as is the result: The parties have agreed in Article 39.05 that failure of the Company to notify an employee of its discipline decision *“within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed”* (emphasis added).
- [48] While that is true, Article 39.05 also stipulates that this timeline runs from the *“date the last statement in connection with the investigation is taken”*. Given that under the Investigation process crew members can attend each other’s Investigations, and their statements can be filed as evidence, this is an important qualifier.
- [49] The Union argued in its Reply that the Company missed the time window to impose discipline on the Grievor. It argued it imposed that discipline beyond the 20-day requirement set out in Article 39.05, given that the second statement was not supplemental, but duplicative. It argued the purpose of such statement was to attempt to extend the time limits. It argued no “fresh allegations” arose and the Company’s decision to conduct a second investigation in these circumstances constituted a breach of procedural fairness.
- [50] It therefore raised an objection that the Investigation process was not conducted either fairly or impartially, given the second Investigations were “redundant”; in “bad faith” and constituted “evidence fishing”.
- [51] The Grievor’s second statement was noted to have been taken on July 5, 2024 – the date of the first statement - at 12:30. This may be in error and it may have been taken later, however a later date is not in evidence. That second statement is dated July 5 so does not serve to extend the time window in Article 39.05 as it is duplicative. Looking at the Grievor’s Investigation dates, the Company was out

of time to issue its discipline. Turning to the Conductor's statements, the second statement of the Conductor was taken on July 17, 2024. While it was the "*last statement in connection with the Investigation*", as contemplated by Article 39.05; and while discipline was issued within 20 days of the date *that* statement was taken, on consideration of the balance of the evidence, the Union's arguments are persuasive and compelling that it was unnecessary, duplicative, and did not serve to extend the time window for issuing the Grievor's discipline.

- [52] While the Company is entitled to hold a supplemental investigation, it is not entitled to do so in order to extend the timeline for issuing discipline, which arises under Article 39.05. To do so would render the Company's obligation to issue discipline within 20 days as "*hollow*". It would strip that clause of the important protections which were bargained for, as between these parties.
- [53] While the first 41 questions and answers are exactly the same, questions 42 to 45 of the Conductor's #2 Investigation explore the Grievor's explanation regarding how he did not see Supt. Smith.
- [54] There are several difficulties with this line of questioning.
- [55] First, Superintendent Smith was questioned at the first Investigation. The question of where Superintendent Smith was standing was already covered in Investigation #1. Any evidence he had to provide could have been – and should have been – asked in the first Investigation.
- [56] Second, while at Q/A 44, Mr. Helm as Investigating Officer states that Supt. Smith was "*standing beside*" the target, that information does not exist in Supt. Smith's memo. Superintendent Smith does not say where he was standing in his Memorandum, nor was he questioned as to that detail.
- [57] All Supt. Smith says in his Memorandum was that he "went to the Pellette crossovers and saw that the H97/98 assignment was in the west end of the yard". The Investigating Officer must only rely on evidence that is on the record when putting information of a witness to an employee.
- [58] Upon careful review and comparison of the two Investigative transcripts for both the Conductor and the Grievor, I am satisfied there was no legitimate basis on which to hold a second, duplicative process, subjecting the Grievor and Conductor to another Investigation, other than *either* a) attempting to extend timelines or b) to try to obtain different answers than those obtained during the first Investigation.

- [59] Either purpose does not result in a process which was fair and impartial for the Grievor.
- [60] In this case, the second process for both individuals was not supplemental; but was duplicative.
- [61] I am therefore satisfied that the Company has failed to comply with the 20-day time limit of Article 39.05 for assessing its discipline, in this dispute.
- [62] As this results in discipline which cannot stand - by the operation of that clause - the bulk of the other arguments of the Company supporting the discipline are rendered moot, except those relating to E-Testing and the consolidation of grievances. Even if discipline were set aside, the issue of whether an E-Test fail occurred still remains to be determined, given the Company maintains E-Test records. The issue of whether the Grievances were improperly consolidated also remains live, as the Union has sought damages for an improper drug and alcohol test.
- [63] Also, it should be noted that there was no evidence Superintendent Smith directed the Investigation, as alleged by the Union. Trainmaster Helm was the Investigating Officer. The fact Superintendent Smith was a witness who authored a memo and also responded to the Step One Grievance did not create an injustice. The Grievance procedure provides for advancement to individuals with more labour relations experience at higher levels to ensure a "second look". The Step Two Grievance was in fact responded to by a Labour Relations Manager.

Did the Union Improperly Consolidate Grievances?

- [64] The Company argued the Union improperly consolidated multiple grievances by raising the issue of the appropriateness of the Grievor's drug and alcohol testing, in the same dispute as the appropriateness of his 40 day suspension. It argued these are two separate issues, which should be subject to two separate grievance processes. It argued **CROA 4557** had determined this issue, and such consolidation was not permitted. It argued this Arbitrator did not have jurisdiction to address the issue of the drug and alcohol testing.
- [65] The Union argued that both issues arise from the same set of facts and are appropriately determined together. It pointed out in its Reply that it had raised issues relating to drug and alcohol testing during the Investigation, at Step 2 and in the JSI.

- [66] In the CROA process, sometimes drug and alcohol issues are brought as separate grievances; and sometimes they are brought together with the underlying discipline. In some cases, the Company does not object; and in others – such as this case – it does.
- [67] The Union relied on **CROA 4825**, a decision of Arbitrator Cameron. While in **CROA 4825**, the Company *did* raise the same issue in the JSI that the Union had improperly consolidated grievances in the JSI, the Arbitrator did not resolve that issue, so there is no reasoning for the Union to rely on, in that Award. The fact he resolved those grievances does not provide any reasoning as *why* he did so.
- [68] The Company relied on **CROA 4557** to support its arguments. In that dispute, *ex parte* Statements of Issue were filed, without receiving authorization from this Office. As the parties are aware, that practice no longer occurs.
- [69] The only matter before the Arbitrator in **CROA 4557** was the preliminary objection of consolidation. While the Arbitrator determined that preliminary objection in the Company's favour, he noted that the result may have been different *had the parties chosen to file a JSI for a particular dispute*. He stated:
- It may well be that, if the parties agree to a Joint Statement, by consent, presents CROA with more than one grievance for adjudication. CROA would proceed to adjudicate the matters thus combined, but it would be on the basis that, by agreeing to a Joint Statement, the parties waived any collective agreement requirements that grievances proceed individually. However, that is not what happened here...(at p. 6, emphasis added).
- [70] He also noted that had the parties *sought* the permission of the Office to proceed *ex parte* (as they are required to do under the CROA Memorandum of Agreement), they may also have been convinced that it was most efficient to combine both issues.
- [71] I am satisfied that in this case, while the Company in the JSI *did* make a fleeting reference to maintaining a preliminary objection, it did not state *what* that objection actually was in the JSI. Instead, it then addressed the merits of the drug and alcohol testing issue.
- [72] A reference to a “*preliminary objection*” without any detail of that objection *is* does not serve to raise that issue in the JSI or reserve any rights in the JSI to present that argument at this hearing.

- [73] There are therefore two difficulties for the Company's preliminary objection: The first is that it was not properly raised in the JSI, and this Arbitrator does not therefore have any jurisdiction to address it.
- [74] *Even if that were not the case* - and as contemplated in **CROA 4557** – I would have been prepared to determine that both the discipline and the drug and alcohol testing were presented to this Office by consent under a JSI, as contemplated by **CROA 4557**. There is therefore jurisdiction for this Office to resolve both disputes.

E-Testing

- [75] The Company argued that E-Testing was not properly raised I the JSI.
- [76] That argument is not compelling. Whether or not a matter is an E-Test is a question of fact. The Company's own witness, Superintendent Smith filed a memo into the Investigation. That memo itself has as its "Re" line: "*E-Test Protecting the Point Walkerville*". Therefore, the Company's *own* witness established in his evidence that he was "*E Testing*".
- [77] Once an E-Test is factually established, then it follows as a matter of legal analysis that the E-Testing framework developed and discussed in **CROA 4866** applies. That analysis is not an "*issue*" to be raised by a party, just as the *Wm. Scott* framework is not an issue. That analysis flows from the fact that an E-Test *occurred*. It is therefore part of the application of the *Re Wm. Scott* analysis applied by Arbitrators, as it relates to determining culpability, which is the first question under that framework.

Did a Failed E-Test Occur?

- [78] It remains necessary to determine if a failed E-Test occurred, given the records kept by the Company relating to this Grievor.
- [79] Whether there even was a "*fail*" was a live issue between the parties.
- [80] The Union alleged that it was the Conductor who was required to ensure he was properly placed, and that the Grievor was entitled to rely on the Conductor's comments that there was room for "*80 cars*".
- [81] The Grievor and the Conductor both stated that the Grievor was told by the Conductor that there was room for "*80 cars*".

- [82] While Superintendent Smith did not hear the full radio conversation – given interference from an engine exhausting - and thus could not dispute whether that was or was not said – it is not the number of cars that raised an issue of a fail of the E Test in this case, or even whether the Conductor could or could not see Superintendent Smith, standing at the crossing. In fact, it is unnecessary to even determine whether or not the point was or was not protected, because it was not the *fact* of point protection that is the issue in this case.
- [83] Rather, what raises the “fail” in this case is the failure of the LE to confirm with the Conductor that point protection was in place during their radio communication.
- [84] Rule 12.3 requires an assessment of placement. It requires that a “crew member” either **be** on the leading piece of equipment or on the ground, depending on whether the track is “*known to be clear*”.
- [85] I agree with the Union that “crew member” referenced in that Rule who must make this initial determination of “*ground or equipment*” can only *be* the Conductor, given that it is only the Conductor that can “be” on that equipment. The LE in this case was 7000 feet away; he could not “be” on that equipment at the leading end, during a reverse shove movement.
- [86] That does not mean an LE has no obligations to ensure the point is protected, however. At the hearing, this Arbitrator questioned the Company representative on what the Company maintained “*should*” have been done by the Grievor. The representative stated that the Grievor *should* have communicated with the Conductor to ensure the movement was safe, by understanding where the Conductor was placed. I agree that the LE had that responsibility, which was confirmed in **CROA 5058**. As noted in **CROA 5058**, this confirmation of point protection is part of an LE’s obligations to ensure a safe shoving movement (at para. 29).
- [87] What caused an E Test “fail” in this case was neither the Conductor nor the Grievor gave evidence that radio communication occurred that the point was protected. One sentence would have met that obligation. The Grievor stated he was told to go back and that it was the Conductor’s job to “*determine that the track [sic] known to be clear*” (Q/A 21). At Q/A 26, he stated that “*we were told we had room for 80 cars. Conductor Heffernan would not have said that if he did*

not know the track was known to be clear or not". An assumption does not confirm the point is protected.

- [88] As noted at para. 31 of **CROA 5058**, an LE cannot rely on a Conductor's information in the abstract, as "[k]nowing where the Conductor was placed was a piece of key and important information for the Grievor to have, to comply with section 12.3" (emphasis in original). That Award determined that the Grievor failed to make the appropriate inquiries to understand the point was protected, and culpability followed.
- [89] I am therefore satisfied a "*failed*" E Test occurred in this case against the Grievor for failing to confirm the point was protected.
- [90] However, given that the discipline must be set aside by the operation of Article 39.05, coaching/mentoring/education is the only remaining possible response for that failure.
- [91] Even if discipline were *not* set aside by the operation of Article 39.05, that same conclusion - that coaching/mentoring/education was the appropriate response - would have been reached through an application of the *E-Testing Framework* developed recently by this Arbitrator.
- [92] **CROA 4866** notes that under the *E-Testing Framework*, there are three factors that must be considered to determine which choice should be applied to a failed E-Test (discipline or coaching/mentoring/education). Those factors are: the severity of the offence; the frequency; and the Grievor's work history. The Grievor's E-Testing record is relevant for considering issues of frequency, while his overall disciplinary record is relevant for issues of his work history.
- [93] Even if discipline had not been set aside, in this case, an assessment of those factors support that coaching/mentoring/education would have been the appropriate response.
- [94] Considering first the issue of severity, as noted in the jurisprudence, railway employees must follow multiple rules each day, the implications of which are serious. The Conductor's initial responsibility under Rule 12.3 is significant, as recognized in multiple Awards, such as **CROA 4351**. I am satisfied that the LE "*confirming*" with the Conductor to make sure he is protecting the point is a "*failsafe*" obligation. It is a "*second check*" of the Conductor's *own* initial responsibility under Rule 12.3, which is to first determine where to place himself or herself to protect the point. As a "*failsafe*" or "*second check*", while it is

important, it does not carry the same severity as would the initial determination made by the Conductor under Rule 12.3. Put another way, if the Conductor were wrong in his initial determination that the point *was* protected, that could cause a more significant issue than if the LE failed to “*double check*” that information – which may have been right or wrong.

- [95] Considering next the element of “frequency”, as pointed out by the Union, the Grievor does not have a history in his E-Testing record of a “*disregard for radio communications*”, which is the phrase used in **AH783**. He has a 96.83% pass rate since 2013, with 252 tests and 85 rides/evaluations. He has failed 9 of those tests. The last E-Test failure previous to this one was in January of 2020, more than *four years* earlier. While it *was* for radio communication, it was for using the Engineers name instead of train symbol or unit number. The factor of “*frequency*” would also support coaching/education/mentoring as an appropriate response.
- [96] Third, the Company placed reliance on the Grievor’s work record, and the fact this was his second major offence, under their disciplinary policy. I have carefully considered the Grievor’s work history. He has been able to regularly work off demerits received. He was assessed with a 30-day suspension in May of 2024, for a “*mainline derailment*”, but the record provides not details of that incident. He had no discipline for the five years between 2016 and 2021, then received 10 demerit points for improper train handling. Considering his discipline record, given his career spanned 27 years (at the time of these events), that record does not spark significant concern he was unable to follow safety rules.
- [97] Given the depth of the Grievor’s service, and his E-Testing and disciplinary record, I am satisfied a disciplinary response for this failed E-Test would not have been reasonable, and that coaching/mentoring/educating the Grievor of his obligations to confirm the point was protected would have sufficed, even if the discipline were not set aside for other reasons.

Was Drug and Alcohol Testing Warranted?

- [98] The Union has alleged that there was no reasonable grounds for the drug and alcohol (“D/A”) test in this case and that damages should be awarded for invasion of privacy. It argued there was no “*near miss*”. It argued the fact that the crew was allowed to keep working was evidence the Company had no reasonable grounds to test. The Company maintained it had cause to test the

crew as shoving blind was a serious issue in this industry and had the potential for serious consequences.

- [99] There are two different bases for testing in this country that are being confused in this dispute. The first is “*reasonable grounds*” testing, which depends for support on *symptoms of impairment*. Those symptoms are the “grounds”.
- [100] That is not the type of testing at issue in this case.
- [101] Another ground for testing – and the one on which the Company relied - was “*near miss*” testing. As noted in *Imperial Oil Ltd. v. C.E.P. Local 900* 2006 CarswellOnt 8621, a form of acceptable testing is testing “*following a significant incident, accident or near miss*” (at p.29). While this is a form of “*reasonable cause*” testing, it is the incident which creates that cause, rather than the symptoms of impairment of an employee.
- [102] That is the type of test at issue in this case.
- [103] As noted in **AH732**, (quoting *Saskatchewan Health Authority v. H.S..A.S.*) there must be “*sufficient gravity*” to an event to qualify as a “*near miss*” (at para. 35) and “*serious damage must almost have occurred*” (quoting *Weyerhaeuser*, at para. 176). As also noted by Arbitrator Sims in the case referred to - *Weyerhaeuser Company Ltd v. C.E.P. Local 447* [2006] 154 L.A.C. (4th) 3 - there must be an exercise of judgment brought to bear to determine if testing is appropriate, which includes the opportunity for the individual to provide his explanation. That individual must also be “*sufficiently close*” to the incident in question to justify such testing (at p. 54).
- [104] Much arbitral ink has been spilled on the meaning of these factors since *Imperial Oil* was decided in 2006. Given the expedited nature of this process, this is not the forum for a detailed analysis of that jurisprudence or of this issue. The parties in fact only provided a few authorities on this issue. The Union has grieved the Company’s drug and alcohol policy and the adjudication of that grievance is in process.
- [105] The Union relied on **CROA 4256**. In that case, there was no connection between the Yardmaster and the collision at issue, or any “*operational involvement*” of that employee to justify testing. It is not surprising that in that case, it was found the Yardmaster did not have “*any involvement or likely responsibility for the collision which occurred*” (at p. 6). The Union also relied on **CROA 4825**, but that case involved “*reasonable grounds*” testing so is also distinguishable. Likewise,

proximity and involvement were also at play in **CROA 4841**, where the employee tested was in his car when the garage door fell. He did not operate the door, nor was he anywhere near the door. However, he was found to be responsible for the actions of the contractor and had “*specifically provided instruction to the contractor concerning the operation of the door*” (at p. 7). It was held that individual was properly tested, as he had sufficient “*involvement*” in the incident”, where a heavy garage door fell.

- [106] In this case, there is no question the LE was “*sufficiently close*” to this reverse shoving movement, given he was responsible for operating the train and was part of the crew taking part in this shove.
- [107] Superintendent Smith was questioned regarding what was the “*near miss*” in this dispute. His answer was that he himself could have been the “*near miss*”, given the Conductor’s evidence was that he was not seen, even though he was standing by the crossing. I am not satisfied that the Company has established the factual basis for Supt. Smith himself being a “*near miss*”. There was no evidence of *where* he in fact was standing, given the evidentiary difficulties with his evidence, already noted.
- [108] Given that lack of evidence, I agree with the Union that the Company has not established there was “*sufficient gravity*” to this situation – that damage “*almost occurred*” as a result of this shoving movement, such that a “*significant incident*” or “*near miss*” occurred, to justify a drug and alcohol test of the Grievor, on these facts.
- [109] That raises the question of the appropriate remedy. The Union argued for damages for the invasion of the Grievor’s privacy. While the Company argued there was no malicious intent, the damages in this case result from the invasion of the Grievor’s privacy in being tested when such testing was not required, and not from any malicious intent in doing so.
- [110] The Union relied on *CPKC v IBEW, Council No. 11* (unreported; August 27, 2024) to support an award of damages. In that case, the Company determined the grievor had no responsibility for the accident which occurred, but the Company decided to test him anyways, which breached his right to privacy.
- [111] That case is distinguishable from the evidence in this case. The Company determined the Grievor *did* have responsibility in its Investigation, although its discipline cannot stand.

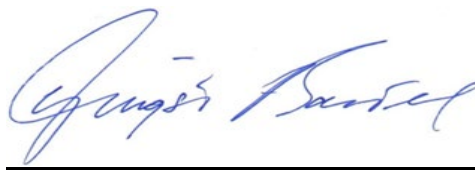
- [112] Given the facts of this case, I am prepared to award the Grievor the sum of \$1,500 for breach of his privacy rights, when he was improperly required to submit to a drug and alcohol test.

Conclusion

- [113] The Grievance is upheld.
- [114] The discipline of 40 days is vacated. The Grievor is to be made whole.
- [115] The precise amount of his compensation is remitted to the parties for their discussion, as is the usual course. Should they be unable to agree, either party may approach the Office to have this matter scheduled for a CROA Session over which I preside. The Office is directed to schedule that issue on an expedited basis.
- [116] The Grievor is also to be paid the additional sum of 1,500.00 as damages for invasion of his privacy.

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

August 5, 2025

A handwritten signature in blue ink, reading "Cheryl Yingst Bartel", is positioned above a solid horizontal line.

**CHERYL YINGST BARTEL
ARBITRATOR**