**AH 703(A) – AH 703(E)**

IN THE MATTER OF ARBITRATION

BETWEEN:

**CANADIAN PACIFIC RAILWAY**

(The "Company")

And

**TEAMSTERS CANADA RAIL CONFERENCE**

(The "Union")

**Caleb Grant**

**Arbitrator:**
Richard I. Hornung, Q.C.

**For the Company:**

| | |
|---|---|
| Sharney Oliver | Manager Labour Relations |
| Poonam Sheemar | Labour Relations Officer |
| Francine Billings | Manager, Labour Relations |

**For the Union:**

| | |
|---|---|
| Michael Church | Counsel |
| Dave Fulton | General Chairperson |
| Doug Edward | Senior Vice General Chairman |
| Brian McGiven | Local Chairperson – Revelstoke |
| Trent Haug | Local Chairperson – Calgary |
| Caleb Grant | Grievor |

**Hearing**
March 2, 2020;
September 23, 2020
Calgary, Alberta

## AWARD

### I

1. Caleb Grant (the “Grievor”) was assessed discipline on a number of occasions between October 1, 2016 and his dismissal on September 1, 2017. The Union filed five grievances in response.

2. The parties agreed that all of the grievances be dealt with together. Each of the grievances will be dealt with chronologically and in the order of their assessment.

### II

**General**

3. At the time of his dismissal, on September 1, 2017, the Grievor was near his 29th birthday. He resides with his partner of twelve years and has three children, ages 10, 8 and 6, who also reside with him.

4. The Grievor joined the Company on August 4, 2014 as a Conductor in Moose Jaw, Saskatchewan. He was training to be an Engineer.

5. At the time of the first grievance, the Grievor had been with the Company for a little over two years. During that period, he had been laid off for a substantial amount of time. In fact, the Grievor had just returned from a 114-day layoff just days before the first booking off incident occurred. His records do not disclose any previous discipline.

**III**

**AH 703 (A)**
**7-Day Deferred Suspension - November 2, 2016**

***Circumstances***

6. On October 20, 2016 the Grievor attended an investigation in connection with his "*work history from September 7th, 2016 to October 1st, 2016*". Following thereon he was assessed a 7-day deferred suspension, on November 2, 2016, as follows:

> *For failure to fulfill your contractual obligation as evidenced by your work history from September 7, 2016 to October 1, 2016. A violation of Canadian Pacific Attendance Management Policy, while employed as an Engineer in Moose Jaw, Saskatchewan….*

7. The Union objected to the vagueness of the Notice to Attend (NTA). However, the documents appended to the NTA included a copy of the Grievor's absenteeism record as well as his work history during the relevant period (Company Tab 3). Given the same sufficient information was provided so as to advise the Grievor of the alleged breach involved. The Union's objection is denied.

8. At the time of the incident, the Grievor was working a swing assignment (K04). Although it was a swing assignment, the Grievor had assigned daily start times and assigned days off which fell on Tuesdays and Wednesdays.

9. Shortly after his return from layoff, the Grievor was absent from duty on four separate occasions in September 2016:

- Friday, September 16, 2016 – Booked off SICK
- Saturday, September 17, 2016 – SICK
- Monday, September 19, 2016 – Booked off UNFIT
- Monday, September 26, 2016 – Booked off UNFIT

***Sick Leave***

***Friday, September 16 and Saturday, September 17***

10. In his investigation, the Grievor explained that on Friday, September 16 and

Saturday September 17, he booked off sick and produced a doctor's note for his absence (Q.15). The veracity of the note was not challenged.

11. While the "*coincidence*" (as alleged by the Company) of his sick days falling on weekends - or otherwise extending his days off - is suspect, those suspicions do not amount to an actionable fact (**CROA 4630**). This is particularly so in this case where an unchallenged doctor's note explains the absence on the two dates in question.

12. Accordingly, the sick days booked off - supported by the doctor's note - cannot be taken as the booking off pattern which the Company alleges. Nor do they attract discipline.

***Book Unfit - Monday, September 19, 2016***

13. The Grievor returned to work on September 18, 2016 but then booked off Unfit on September 19, 2016. His explanation for the same is as follows (Q.17):

> *17. Can you indicate the circumstances for booking off unfit Monday, September 19th?*
>
> *A. I got off work the night previous and was subsequently called by my wife. She told me that she was sick and I needed to come home and take her to the doctor. She was exceptionally sick, sinus infection, chest cold, strep throat. Up until I called in and booked unfit I still intended to go to work. I attempted to sleep and couldn't because I was caring for my wife and kids.*

***Book Unfit - Monday, September 26, 2016***

14. Finally, the Grievor, booked off Unfit on the next Monday (September 26, 2016). His explanation for the same was:

> *23. Can you indicate the circumstances for booking unfit on Monday September 26th, 2016?*
>
> *A. Due to the randomly varying start times of my shift combines with the fact that all shifts prior were 10 hours I was unable to achieve a routine sleep pattern therefore I was unfit.*
>
> *24. Do you understand that you are on an assigned job and as such*

*know when you're going to work, allowing you to plan to be rested?*

*A. I can understand the company's position; however I was unfit for duty.*

15. When the Grievor was asked whether or not he understood that booking off two consecutive Mondays - when he had Tuesday/ Wednesday off - could be perceived as a pattern in an attempt to extend his time off, his answer was that:

> *Any pattern inferred by Company is coincidental as the instances were separate and circumstances were entirely different.*

16. In essence, the Union argues that the Grievor was entitled to the booking unfit exception in the Collective Bargaining agreement as an unquestionable means of booking off when he felt it necessary to do so.

17. In a previous decision before this arbitrator (**CROA 4715-D)**, the parties argued the same issue and it was concluded:

> *15. I do not disagree with the Union's perspective that the Book Unfit clause is specifically designed to ensure that an employee is rested and fit for work and that an employee is entitled to rely on the clause in appropriate circumstances without fear of discipline.*
>
> *16. That said, Article 35 was not intended to serve as a shield for the Grievor to engage in inappropriate booking off conduct that represents a breach of his obligations to the Company.*
>
> *17. It would be inconsistent with practical realities to accept that Article 35 was intended to provide an employee with a carte Blanche right to utilize Article 35 solely to accommodate his/her own interest and without regard for the propriety or necessity to invoke it. This is particularly so when Article 35 is repeatedly invoked in a manner that reflects pattern absenteeism to extend weekends or days off.*

18. The Company argues that the Grievor had an assigned schedule with set start times and days off and therefore ought to have been able to schedule his time appropriately to be both rested and fit for duty. Having regard to the timing of the time off taken, I understand why Company has its suspicions regarding the Grievor's explanation. However, even multiple suspicions do not amount to a fact. Absent the accounted for sick leave which would support the Company's argument

of pattern absenteeism, I am unable to conclude that the Grievor's invoking the Book Unfit clause on the day in question amounted to disciplinable conduct.

19. However, September 19, 2016 is another matter. The Grievor chose to book unfit to excuse his absence on that date when he knew, or ought to have know, that the appropriate avenue was to request personal leave from his local manager.

20. The Union argues that a consideration, in this instance, should be that personal leave is difficult to obtain: *"…at the best of times and must be requested through a local Manager. They are more often than not denied due to manpower constraints*".

21. With respect, the process of obtaining personal leave is not an issue in this case. If obtaining leave was/is a problem the Union has a remedy (*via* a grievance) wherein all the circumstances can be weighed. In all events, the broad statement above, in the context of this matter, does not provide an excuse/explanation for relying on an unfit clause where personal leave is more appropriate, as is the case here.

22. As indicated in **CROA 4715(C), t**he Grievor's "contractual obligation" - as referred to in his discipline - includes the obligation to appropriately book off sick when the circumstances warrant it. Here, he failed to do so. For the similar reasons arrived at in **CROA 4715(C),** I conclude that the Grievor's failure to rely on his personal leave opportunities to book off sick was disciplinable in these circumstances.

23. The issue remains: what is the appropriate discipline?

***Improper Application of Deferral***

24. Union challenges the Company's ability to impose a deferred suspension in this case. This challenge regarding the imposition of a deferred suspension has been dealt with by a number of decisions in the CROA process.

25. In **CROA 4630**, Arbitrator Clarke noted:

> *In CROA&DR 4620, Arbitrator Sims found as one of the reasons requiring intervention CP's imposition of deferred discipline:*
>
> > *The Union's first point is that this hybrid form of suspension and "suspended suspension" is contrary to Article 23.09 of the collective agreement. The penalty assessed amounts to a form of deferred discipline. Generally, the choice of disciplinary penalty falls to management. However, the parties have chosen to define, by agreement, just when and how deferred discipline may be used. This does not fall within that defined purpose, nor does it adopt the agreed upon procedure. There is nothing in the agreement to authorize a penalty to stand, but only be served in the event of future default. For these reasons alone the penalty must be altered.*
>
> *The arbitrator agrees with this reasoning as an additional reason requiring intervention.*

26. Thereafter, In **CROA 4638**, this arbitrator adopted the reasoning above stating:

> *As already pointed out by Arbitrator Sims in CROA 4620 and Arbitrator Clarke in CROA 4630, the use of deferred discipline must fall within the parameters of Article 70.09. In both the 14 and 30 day suspensions, they do not. However, while the deferred disciplines imposed did not comply with the provisions of Article 70.09, the breach of the same (as reflected by both decisions above) calls for an intervention and alteration of the penalty rather than voiding the discipline in its entirety.*

27. Having regard to the above, and Section 60(2) of the *Canada Labour Code*, I conclude that a deferred suspension is appropriate in this instance. However, because the initial discipline was imposed for 3 absences, it is only fair for the discipline to be adjusted having regard to the single breach as concluded above. The grievance is allowed in part and a penalty of a 3 day deferred suspension set in its place.

## IV

**AH 703(B)**
**7-Day Suspension and 14-Day Suspension**

28. On November 2, 2016, following two separate investigations, which took place on October 20, 2016, the Grievor was issued a 7-day suspension for:

> *…failing to correctly apply hand brakes on October 9, 2016 while working*

*assignment KR01, as a Conductor in Regina, SK.*

29. A further 14-day suspension was issued on the same day for:

> *…failing to communicate intent to detrain while employed as a Conductor in Regina, SK on October 9, 2016*

30. As is apparent from the above, both suspensions related to the Grievor's alleged conduct on the same tour of duty. It is also of note, that the investigations on the above two matters took place on the same day (October 20, 2016) as in the investigation related to the discipline imposed in grievance **AH 703(A)**.

31. At the outset, the Union argued that the investigation was not fair and impartial. Notwithstanding the numerous objections at the investigation, there is no evidence which would meet the threshold for a conclusion that the investigation was not fair and impartial. The Union's argument is, accordingly, dismissed.

32. The facts are not in dispute. On October 9, 2016, Train Master, Aidan Finucane conducted nine proficiency tests on the Grievor beginning at 5:45 and concluding at 11:26.

33. Train Master, Finucane's notes which appear on the Exhibit describe the circumstances of the handbrake incident as follows:

> *Mr. Grant released a hand brake from a position on the ground. Mr. Grant was observed spinning the hand brake wheel with his hand inside the spokes and further using the spoke of the wheel to provide the final torque.*
> *…*
>
> *I performed follow-up observations of Mr. Grant applying hand brakes and he passed successfully. Re: test for fail issued by TM Finucane.*

34. The Train Master described the detraining incident as follows:

> *Mr. Grant failed to inform his Engineer of his intent to detrain the moving equipment. As well, failed to inform his Engineer that he was clear of the movement once he did, in fact, detrain.*

35. With regard to the failed hand brake: the Grievor's evidence, at Q.13-Q.17 (Union Tab 2), discloses that the Train Master and he had a difference of opinion regarding the appropriate physical height at which the hand brake should be adjusted. (The Trainmaster later agreed with the Grievor). It also reveals that, after the Grievor failed the initial hand brake test, the Train Master spoke with him and instructed him on the appropriate manner of applying the hand brake.

36. According to the Grievor's uncontroverted evidence, the Train Master indicated that the discussion would be sufficient instruction and he would not be given a "*fail*" on the test.

37. Given the fact that the Grievor's evidence is uncontroverted in this regard; and, the fact that Train Master subsequently observed him in the follow-up and noted that the Grievor performed the manoeuvre satisfactorily and "passed the test", I accept the Grievor's evidence that no "fail" would be entered against him.

38. In the discussion relative to the detraining discipline (Union Tab 4; Q.13-Q15), the Grievor admits that he detrained improperly and that he was instructed by the Train Master on the proper way to do it. He explained that the circumstances were such as to substantially reduce the probability of an injury or accident occurring from his conduct (i.e. he was walking faster than the train was moving). Nevertheless, it is apparent that he was in breach of the Rule.

39. The only issue is what, if any, was the appropriate discipline in this case.

***Proficiency tests***

40. Both the disciplines involved a failure while being observed during a proficiency test. The Union argues that a proficiency test is an instructional tool which should not attract discipline.

41. The issue of proficiency testing has been repeatedly canvassed. In **CROA 4580**,

Arbitrator Sims noted:

> *The Union repeats its usual objection to the use of efficiency testing as a stepping stone into the disciplinary process. The policy "Efficiency Tests Codes and Description for Trains and Engine Employees" reads, in part:*
>
> > *An efficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action, efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results.*
> >
> > *This policy, while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage.*

42. Similarly, in **CROA 4603**, Arbitrator Clarke observed:

> *Both incidents arose initially from efficiency tests, a practice to which the TCRC objects. This Office has found that efficiency tests do not necessarily exclude discipline if proper grounds exist: CROA&DR 4580 and CROA&DR 4591, though this context may be taken into account when evaluating discipline.*

43. A proficiency test is intended to evaluate an employee's compliance with the rules and procedures and to isolate those areas of non-compliance for corrective action. The purpose of the testing process is to be instructive rather than disciplinary. Nevertheless, as noted, the appropriate corrective action can vary from counseling to a disciplinary assessment depending on the circumstances.

44. The Union argues that an adverse inference should be drawn against the Company based on the fact the Grievor was subjected to nine proficiency tests in a single day. While I am given pause by that fact, no evidence was adduced which would allow me to conclude whether it was abnormal or excessive in the circumstances.

45. In the circumstances here, any discipline at all for the hand brake incident is simply

unwarranted. I am satisfied that the Train Master and the Grievor had a discussion about the appropriate procedure to follow; that the Train Master acknowledged that there would be no "*fail*" on the test considering the circumstances; and, that the Grievor – as his testing process continued over the course of the day – was subsequently observed adjusting the hand brake correctly. I am of the view that this was an appropriate incident where the discussion was sufficient and I can find no justification for discipline being imposed.

46. With respect to detraining, the Grievor acknowledged his failure to detrain appropriately. However, in my view the discipline imposed of a 14-day suspension is far out of proportion as to realistically reflect appropriate discipline. I conclude, having regard to the Grievor's previous record, that the 14-day suspension be removed and replaced with a 7 day deferred suspension.

47. The Grievor shall be made whole. I retain jurisdiction in that regard.

**V**

**AH 703(C)**
**14-Day Deferred Suspension**

48. Following a formal investigation on January 11, 2017, the Grievor was issued a 14-day suspension (deferred) for the following breach of Company policy:

> *…failure to fulfill your contractual obligation as evidenced by your missing calls for duty on December 30 & 31, 2016. A violation of Canadian Pacific Attendance Management Policy, while employed as a Conductor in Moose Jaw, SK.*

49. In the Joint Statement of Issue submitted by the parties on January 30, 2020, the Union submits that the Company:

> *1) Improperly applied the process of deferred discipline;*
>
> *2) Assessed an unjustified, unwarranted and excessive discipline against the Grievor, including a failure to consider significant mitigating factors; and,*

*3) Improperly applied the principles of progressive discipline.*

50. This award will deal with only those three positions raised by the Union in the Joint Statement of Issue.

51. The remaining issues raised by the Union, in its submissions or otherwise, are objected to by the Company on the basis that the Union did not raise them in the Joint Statement of Issue. And, therefore it is precluded from now doing so both on the basis of their agreement of May 30, 2018, as well as the provisions of the *CROA Memorandum of Agreement* itself. I agree. For the reasons outlined in **CROA 4739** and **4744**, the Union is precluded from raising any issues other than those disclosed in the JSI.

***Circumstances***

52. There is no dispute that the Grievor was off on rest and available to work on December 30, 2016 at 03:35.

53. Over the period of December 30-31, 2016, the Grievor received three calls for duty: the first at 19:33 on December 30, 2016; the second at 02:18 on December 31, 2016; and, the third at 07:49 on December 31, 2016.

54. When he attended his investigation on January 11, 2017 - in connection with his "*work history from December 1 to 31, 2016*" - the Grievor provided documents that provided medical evidence which justified his absence on an earlier date (December 10, 2016), a date which was included in the ATN. Therefore the only date at issue here is that of December 30/31, 2016.

55. The Union does not deny that the Grievor missed the three calls in question. Rather, it argues that the Grievor provided a credible explanation and that, given the same, the discipline was, *inter alia*, excessive.

56. At the investigation, when asked why he missed the first call of duty at 19:33 on December 30, 2016, the Grievor stated:

> *19. Can you indicate why you missed this call for duty when you were off rest and available for duty?*
>
> *A I had gone to bed earlier in the evening, left my phone beside my bed, somewhere between my going to bed and my missing the call my 3 year old took my phone out of the room and was playing with it, and turning it off.*

57. He provided the same answer for why he missed the second call for duty at 02:18 PM on December 31, 2016. He then provided the identical explanation for why he missed the third call at 07:49 AM on December 31, 2016.

58. Based on the explanation he provided: he was already asleep at some time prior to 7:30PM on the evening of December 30, 2016, and therefore did not hear the calls; nor did he notice that his 3 year old child had removed his phone; that he slept for more than 12 hours without waking; that over the course of that more than 12 hour period, he did not hear his phone nor did he - or anyone else in his house - notice that his 3 year old child had it; and, finally, as a consequence of all those variables he missed 3 successive calls and was not awake next day to get the last call at 07:49 AM.

59. His answer, has a *"dog ate my homework*" ring to it which, considering the circumstances, strains credulity. The *bona fides* of his explanations regarding his inability to accept the calls, is further strained by his response regarding what he did when he discovered the missed 3 calls. When asked if he contacted the Company, he responded that he did not and stated that he was: "*unaware that I had to call Management when I missed a call*".

60. While, strictly speaking, there may not be an "*obligation*" to call Management and advise them of the circumstances, his conduct after he discovered he missed the calls is relevant in testing the credibility of the Grievor's evidence. As set out in *Farnya v. Chorney (1952) 2 DLR 354:*

> *The test must reasonably subject (the Grievor's) story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

61. I am unable to see the Grievor's failure/refusal to call the Company and explain his predicament as being in: *"… harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".* Whether the Grievor felt he was compelled to do so or not, in my view, a practical and informed person, caught in those circumstances, would reasonably have called his supervisor to provide an honest explanation. The Grievor's failure to do so, and his indifferent response that he was "*not aware that he had to call Management",* simply reinforces the view with respect to the truthfulness of his explanation.

***Appropriate Discipline***

62. The Union argues that the Company's imposition of deferred discipline is in violation of Article 39.13. The determination of the Union's argument here, is in accordance with that arrived at in **AH 703(A).**

63. The Union also argues that progressive discipline must be applied. I agree. However, a review of the previous awards, herein, makes it apparent that progressive discipline was applied to the Grievor.

64. The Grievor's conduct in missing his calls for duty is deserving of discipline. In the circumstances, the 14-day deferred suspension is reasonable having regard to the Grievor's disciplinary record – as determined in **AH 703 (A)-(C)** – and his disingenuous testimony.

65. The grievance is dismissed.

**VI**

**AH 703(D) - 30 Day Suspension**

66. Following an investigation, the Grievor was issued a 30 day suspension on February 17, 2017 as follows:

> *Please be advised that your discipline record has been assessed with a 30 Day Suspension from Company service without pay (effective 0001 February 27 to 2359 March 28, 2017 for the following reason(s):*
>
> > *For failure to set off seven cars at Regina Intermodal while working as the Conductor on train 119-24 causing operation delays on January 27, 2017. A violation of Train and Engine Safety Rule Book – Core Safety Rules and T-0 Job Briefing; Rule Book for Train & Engine Employees - Section 2.2 (a)(c)(v)(vi)(ix)(x) & (xii) and Section 2.3 (a) & (b).*

67. The Union, in the Joint Statement of Issue, contends that:

> *1) The Company failed to meet the burden of proof or establish culpability regarding many allegations outlined;*
>
> *2) Mr. Grant's 30-day suspension is unjustified, unwarranted and excessive in the circumstances included mitigating factors; and*
>
> *3) The penalty assessed is contrary to the Arbitral principles of progressive discipline.*

68. The Union filed a Brief which included additional allegations of targeting; disciplinary discrimination; and the locomotive engineer not being part of the investigation.

69. The additional issues raised by the Union are objected to by the Company on the basis that the Union did not raise them in the Joint Statement of Issue. And, therefore it is precluded from now doing so on both the basis of their agreement of May 30, 2018, as well as the provisions of the *CROA Memorandum of Agreement* itself. I agree. As concluded earlier above, for the reasons outlined in **CROA 4739** and **4744**, the Union is precluded from raising any issues other than those disclosed in the JSI.

***Circumstances***

70. On January 27, 2017, the Grievor was the Conductor on Train 119-24 operating

west-bound from Broadview to Moose Jaw. 119 is a “hot” train made up of both intermodal and manifest traffic. Being a 100 series train, it carries rush - and more important - traffic. On the day in question, 119-24 had seven cars at the head-end which were designated for Regina IMS (Intermodal System) facility.

71. The Train Tonnage Profile attached to the Grievor’s investigation transcript, (Company Tab 5) reflects that the destination code for the 7 cars is Regina IMS *#6026EX1.*

72. The information relative to the disposition of the seven cars is more clearly set out in Tab 4 of the Company’s exhibits. However, the Union objects to the introduction of the same on the basis that the hearing was the:

> *... first time the Union or the Grievor saw the document. While the Company lists the evidence entered at the investigation at paragraph 19, it is notable that there was no evidence entered regarding any operating plan nor documentation with respect to the alleged delayed customers.*

The Company did not dispute the Union’s allegations in this regard. Accordingly, following the accepted jurisprudence, the document will not be admitted and will be disregarded.

73. While the Company objected to the Union’s submissions – where they referred to extrinsic, facts and opinions relative to CP’s operation - the best evidence of the relevant facts can be found in the investigation itself.

74. At the investigation, the Grievor acknowledged that he understood his responsibilities pursuant to the *Train and Engine Safety Rule Book dated October 2015 T-0 Job Briefing 1,* including:

> *Before performing any job, a job briefing led by the foreman/conductor must be held to ensure that all employees involved have a clear understanding of:*
>
> - *The task to be performed;*
> - *Your individual responsibility; and*
> - *Situational awareness concerns.*

75. The following excerpts describe his involvement in the incident (emphasis added):

> *15. Was there an initial job briefing at the start of the tour?*
> *A. Yes*
>
> *16. Were all crew members present for the job briefing?*
> *A. Yes.*
>
> *17.* ***What was discussed in the briefing?***
> *A.* ***Discussed the TGBO. The lack of a work message at on duty time.***
>
> *18.* ***Were cars to be set off online discussed?***
> *A.* ***There was none that I was aware of.***
>
> *19.* ***When you looked at your tonnage profile and saw the 6026EX1 classcode where did you think the cars were to be set off?***
> ***A. West of Pasqua.***
>
> *20.* ***Where on the Indian Head sub are intermodal cars worked?***
> ***A. At the intermodal hub at Regina.***
>
> *21. On the approach to Regina was another job briefing performed?*
> *A. Yes*
>
> *22. What was discussed in the briefing?*
> *A. Reminded each to get instructions thru Regina. Which were in and thru on the South main track. Discussed 410 being on the North main track.*
>
> *[…]*
>
> *24. On Appendix B there are lines drawn between 1 to 7 which would have been the Regina IMS set off. Can you explain?*
> *A. Coming into Moose Jaw the ATM said to set the cars off to the North Passing track before the outgoing crew came on duty.*
>
> *25. Was it on the approach to Moose Jaw that those lines were drawn?*
> *A. Yes.*
>
> *26. Coming into Regina did you and your engineer discuss whether there were cars to set off?*
> *A. Yes*
>
> *27. Was it known by the crew that those cars were for Regina?*
> *A. No.*
>
> *28.* ***When looking at your tonnage and seeing the 6026EX1 code did you ask the engineer if the cars were for Regina?***
> ***A. I did.***

***29. What was discussed?***
***A. I asked the engineer if he knew where 6026 was. He said he did not. After looking at the time table and searching for 6026 it couldn't be found. So I thought that the cars were going through to Moose Jaw. 6025 was Pasqua so I thought 6026 was somewhere west of Pasqua.***

*30.* ***Did you ask the ATM in Regina for Clarification?***
***A. No. Just asked for instructions in Regina.***

*31.* ***If you were uncertain where the cars were going why did you not ask the ATM?***
***A. I had no reason to believe the cars were to be set off East of Moose Jaw giving his instructions and not being able to find 6026 on the Indian Head sub Time table.***

*32.* ***Was there any attempt made to contact the IMS Supervisor in Regina?***
***A. No***

*33. When coming into Moose Jaw and you were instructed to set off the cars to the passing track did you think the cars were for Moose Jaw?*
*A. At that time I was informed that the cars were for the hub and I had failed to set them off.*
*34. Have you set off cars to Regina IMS before?*
*A. Yes*

*35. How did you know that the cars were to be set off previously?*
*A. On ATM instructions. I have only set off to IMS on eastbound trains. The instruction to set off cars came from the ATM in Moose Jaw. Then when calling the Regina ATM they give similar instructions.*

76. The investigation makes it apparent that the Grievor was aware of his responsibilities, as Conductor, to lead a job briefing and ensure that all employees involved had a clear understanding of the tasks to be performed. It is equally clear from the Appendices provided (Company Tab 5), that the "*Train Tonnage Profile*" which the Grievor had available at the time that the job briefing took place, refers to the fact that seven cars were to be set off at: "*6026EX1*".

77. Notwithstanding his responsibility to conduct the briefing, the Grievor states (Q.18) that he was unaware of any discussion regarding cars to be set-off. Further, in his explanation (Q19) regarding where the cars were to be set-off - having regard to their class code "*6026EX1*" - he explained: "*West of Pasqua*".

78. In Q. 29, he allows that he asked the Engineer "*if he knew where 6026 was."* When the Engineer said he did not, the Grievor looked at the time-table and, unable to find 6026EX1, he assumed the cars were going on to Moose Jaw. He states: *"6025 was Pasqua so I thought 6026 was somewhere west of Moose Jaw"*. When he was asked why, if he was uncertain where the cars were going, he didn't ask the ATM, he said that he: "*had no reason to believe the cars would be set off east of Moose Jaw*"

79. All of his answers related to the location of 6026, taken together, are perplexing and confusing at best; especially when one considers he did not name the location "West of Moose Jaw" or "West of Pasqua" (Moose Jaw is actually the next location West of Pasqua) where the cars were to be set off.

80. The cars were Intermodal. The only point between Broadview and Moose Jaw where Intermodal cars could be unloaded was at the IMS. The Grievor was aware of this fact because he had dropped off cars at the IMS previously. He evaded taking responsibility because, on that occasion, he was travelling the opposite direction; and, he had been guided through the Intermodal set-offs by the ATM in Regina.

81. The Union argues that the ATM – even though not requested to do so by the Grievor - should have clarified the appropriate process to drop the cars at the IMS. Even if that is so, it does not excuse the Grievor's primary responsibility to be aware of the load and to be equally aware of where the cars had to have been set-off.

82. The Grievor had the Train Tonnage Profile; he knew of the existence of the IMS; and he was aware that cars needed to be set off – even before the trip began at Broadview. Although he admits that he was not aware of the set-off location (6026EX), he did nothing to get the information and brief the crew.

83. The role of the Conductor is a critical one. The failure to carry out the specific duties required of the position can, at any stage, put the operation of the train in jeopardy. Here, the Grievor's primary duty - prior to conducting his briefing - was to apprise himself of all the details relative to the operation of the train between its points of service on his trip. If he was uncertain of what his duties entailed for that tour, it was incumbent on him, as Conductor, to make the appropriate inquires.

84. His failure to fulfill his duties by making himself aware of the appropriate information and then following up to get clarification where necessary, reflect a lack of performance of his duties that amounts to operational negligence.

85. The Grievor's explanations and his lack of accountability – other than his answer at Q.46 that: *"it was a mistake that will not be made in the future"* – are insufficient to convince me that he fully recognized his error or responsibilities.

86. In the circumstances, I am unable to conclude that the discipline of a 30-day suspension imposed by the Company should be interfered with.

87. The grievance is dismissed.

**VII**

**AH 703(E)**
**Dismissal**

88. Following an investigation, Conductor Grant was dismissed on September 1, 2017 as follows:

> *Please be advised that you have been DISMISSED from Company Service for the following reason(s):*
>
> *Failing to control your movement, train 301-499, at controlled location Shuswap resulting in signal 691 displaying Stop, being passed without authority, August 14, 2017 Shuswap Subdivision. Violations of Rule Book for T & E Employees Section 2 – General, item 2.2(a), item 2.2 (c),(v)(vi),(xii) and item 2.3 (a),(b),(c),(d), Section 6 – Signals, Item 6.5 Fixed signal Recognition and Compliance and Section 19 – Block and Interlocking Signals, Item 19.3, Rule 439.*

*(A Copy of Form 104 is attached under Tab 1)*

89. In the JSI, the Union contends that:

> *… Mr. Grant's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.*

90. The terms of JSI notwithstanding the Union, again, filed a broad Brief which included additional allegations of: targeting; disciplinary discrimination; references to materials not provided within the investigation; and, the locomotive engineer not being part of the investigation.

91. The additional issues raised by the Union, in its submissions or otherwise, are objected to by the Company on the basis that the Union did not raise them in the JSI. And, therefore it is precluded from now doing so on both the basis of the parties' agreement of May 30, 2018, as well as the provisions of the *CROA Memorandum of Agreement* itself. I agree. For the reasons outlined in **CROA 4739** and **4744**, that the Union is precluded from raising any issues other than those disclosed in the JSI.

***Circumstances***

92. On August 14, 2017, Train 301-499 was traveling west-bound, on the Shuswap Subdivision, when the crew was informed of a young child trespassing on or near the track around mile 67.8. As the train encountered signal 673, the crew identified a clear to stop signal. The clear to stop signal means "*proceed, preparing to stop at next signal*" and is intended to forewarn the crew to prepare well in advance in order to ensure a proper speed for stopping, turnouts or other track conditions.

93. There is no dispute that the Grievor was aware of and understood that he was operating on a clear to stop. After the crew identified the clear to stop at 673, it was communicated in the cab between them and the Grievor broadcast it on the

radio. However, following that, no further conversations relative to the clear to stop signal took place (Conductor Burgart's investigation; Company Tab 5, Q.19 et. seq.). According to the Grievor, the subsequent conversation in this respect did not take place because (Q25):

> *Q.25 Mr. Grant after passing signal 673, indicating clear to stop, was a job briefing performed as to what you and Mr. Burgart would be doing to be prepared to stop at signal 691 while watching for the trespasser that was reported?*
>
> *A. We were both talking about the trespasser. We were both occupied with that.*

94. He did not discuss - with the Engineer - how the crew was planning to comply with the stop signal (Q.32). Rather, he felt that: "*his Engineer was in control of the train*".

95. Approximately 0.5 miles after signal 673 – which the crew confirmed was clear to stop – the train came on the reported location of the trespasser who had, by this time, disappeared. Signal 691 was another 1.2 miles after that reported location. The RTC, advised them that they were: "OK *to continue with caution*".

96. After passing the reported location of the trespasser – and while still operating under the clear to stop protocol – the Grievor and Engineer inexplicably allowed the train to speed up. Their speed had increased from 12.5 mph to 22.5 mph by the time that the train arrived at stop signal 691. By the time that they noticed it, it was too late. Although both the Grievor and the Locomotive Engineer put the train into emergency, it passed the stop signal by two car lengths.

97. The Grievor (Tab 5, Q.19) explained his inattention and failure to stop as follows:

> *Q.19 Mr. Grant why were you not able to stop at signal 691 at Shuswap?*
>
> *A. So through Salmon Arm we heard the train ahead of us advising the RTC of a trespasser in and around mile 67.8. Coming up to the 46th avenue crossing we received a call from the RTC asking us if we were able to bring our train to a stop as long we weren't blocking anything. She was going to get more information about the boy who was around the tracks. It was about this time that Foreman, Abe*

> *Elkeswani broke into the conversation telling the RTC that he had seen the kid jump up from the side of the tracks and duck into one of the campgrounds. RTC and the foreman had a conversation a minute or two long before RTC advised us ok to continue with caution. We didn't end up stopping the train we just continued on. We came around the corner and we could see the foreman on the south side of the tracks, we were watching the north side of the tracks for the kid in question. There are two separate campgrounds there we weren't sure which one he had ducked into. Right when we came around the corner we did call the intermediate signal on the radio and in the cab. As soon as that happened we put the radio down and started to really focus on the trees beside us looking for the young boy. Even coming around the beach to the signal there is still access from the campground and when we came around the corner and saw the signal we did our best to stop the train.*

98. I accept that the presence of the trespasser was a mitigating factor and that there were no serious consequences which resulted because of the run through. Although a consideration, neither of those factors are determinative; nor do they change the fact that the conduct of the Engineer and the Grievor was culpable and deserving of discipline.

***Appropriate discipline***

99. A Rule 439 violation is a cardinal rule violation and has been treated very seriously in prior CROA decisions (**CROA 4391**). The circumstances of the present case are similar to those discussed in **CROA 4581.** While the consequences of the Grievor's actions, in this case, do not equate with those in **CROA 4581**, the facts, analysis and conclusion are informative for our purposes here. Arbitrator Sims states:

> *The evidence discloses both Rule 411 and Rule 439 violations. It shows that the Engineer failed to reduce speed in response to the situational issues that arose; the smoke obscuring where a signal would have been known to exist and any feeling of distraction or overload due to the pedestrian warning. The very proximity of train 118-18, close to a crossover point, should also have induced caution. While the locomotive engineer had direct control of the speed, the notion of shared crew responsibility means that Mr. Taylor as conductor still carried responsibilities, particularly for signal monitoring during the movement.*
>
> *The grievor, in his investigation says he observed the Clear to Stop indicator at signal 15-2 and communicated that to the locomotive engineer. He did not, however, reiterate this after they had passed signal 15-2*

> *because he was quite confident in the engineer's ability, and was not concerned about how the movement was being handled and did not think there was a problem.*

100. In this case, in addition to their failure to stop, the Engineer and the Grievor disregarded the protocols after passing a Clear to Stop signal and then, inexplicably, increased the speed of the train by approximately 10 mph rather than maintaining the safe speed as required by the Clear to Stop protocol.

101. The question is what degree of discipline is appropriate for the Grievor? The Engineer was assessed a 30-day suspension. Notwithstanding my earlier ruling, I regard the penalty assessed to the Engineer as a mitigating circumstance which I can fairly consider. While I am unaware of the Engineer's record or circumstances I accept – as a consideration – that the Engineer's penalty was not dismissal.

102. To his credit the Grievor did not, on this occasion, attempt to deny his responsibility with respect to the incident or fail to appreciate the severity of his breach of protocol.

103. Unlike in his previous investigations, he was candid and direct regarding the circumstances surrounding the incident. He recognized the seriousness of the events; accepted responsibility; and, apologized. He states:

> *This is in no way an excuse or an attempt to shift blame. It is meant as an explanation only. Having recently moved my wife and three kids I do plan to make Revelstoke my permanent home and career location. Given the opportunity I will strive to ensure something like this doesn't happen again.*

104. Weighed against the mitigating factors are his short service; his discipline record as determined in the earlier cases; and the fact that – until this matter – he did not, in my view, take responsibility for his own actions.

105. The Grievor's conduct in his 30-day suspension, as discussed in **AH 703(D),** was a serious transgression which reflects his lack of focus and attention to the requirements of his job as well as his apparent inability to take responsibility for his

own conduct or understand the necessity to comply with the Company's policies and rules in order to avoid just the thing that happened in the present case.

106. That said, I am mindful of the fact that – in this case – the Grievor expressed his remorse, accepted responsibility for the same and was candid with respect to his participation and his errors leading to the incident. The apparent attitude and maturity displayed in this investigation is a significant improvement over the cavalier positions he took in the past.

107. Despite the fact that the disciplines grew with alarming speed over the past two years, and his service with the Company is limited, like Arbitrator Sims in **CROA 4581**, I conclude that the Grievor is worthy of a final chance to preserve his career with CP. Notwithstanding the seriousness of his Rule violations in this case, and despite his past conduct and his attitude displayed therein, I find that his candour and remorse for his conduct in this case signals the fact that the Grievor has matured and may now understand and appreciate the benefits of his job and the importance of both getting a second chance as well as following the Company's safety protocols.

***Conclusion***

108. Considering the above, I am of the view that the Grievor's employment relationship is capable of restoration. His dismissal shall be set aside and that he is to be reinstated to his employment without loss of seniority, but without compensation (his time away shall be noted as a suspension), on a last chance basis as set forth below.

109. The Grievor's reinstatement shall be subject to the following terms and conditions:

a) Prior to return to active service the Grievor will be required to successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the Grievor's return

to work and to provide a full understanding and clarity regarding these expectations. If he so desires, an accredited representative may accompany the Grievor to this interview.

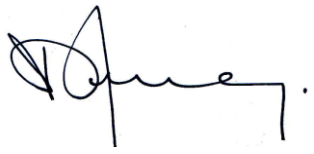
b) The Grievor will be reinstated at the last Step and, as such, his employment with the Company will be in jeopardy if he commits a future offense for which discipline is warranted within the next two (2) years.

c) The Grievor's discipline standing will only regress one Step in the Progressive Discipline Steps following two (2) years of discipline free service and thereafter will regress one Step for each additional year of discipline free service.

d) This determination should be understood by the Grievor to be a last-chance opportunity to show his employer that he can work in a compliant and safe manner as required by his position. Any violation of the terms hereof may result in discipline up to and including dismissal.

110. I shall retain jurisdiction with respect to the application, interpretation and implementation of this – and the preceding four awards.

Dated at the City of Calgary this 3rd day of December, 2020.



**Richard I. Hornung, Q.C.**
**ARBITRATOR**