IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(the Company)

AH: 773

DISPUTE

Appeal of the dismissal of Conductor Troy Woodhouse.

JOINT STATEMENT OF ISSUE

1. Following an investigation Mr. Woodhouse was dismissed which was described as "For Conduct Unbecoming of an Employee during your tour of duty while working Train 865-098 on August 5, 2019 on the Shuswap Subdivision. For using non-actual off duty times on your tie up for train 865-098 which resulted in a fraudulent $80.00 premium payment. For using non-actual off duty times on your tie up for 865-098 which resulted in the generation of an illegitimate Over 10 Hour Violation against Canadian Pacific."

UNION POSITION

2. The Union contends the penalty is unjustified, unwarranted, and excessive in all of the circumstances, including mitigating factors evident in this matter. It is also the Union's contention that a separate grievance has been advanced regarding the Company's Discipline Policy, although this policy is not in dispute in the present matter.

3. The Union requests that Mr. Woodhouse be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

4. The Company disagrees and denies the Union's request.

5. The Company maintains the Grievor's culpability was established following the fair and impartial investigation into this matter and the discipline was properly assessed.

6. As stated within the Grievor's Investigation, the CMA Honour System states employees are responsible for their own time slips, and that they must be familiar and be able to properly apply their Collective Agreement, Method of Pay and Local rules to them. When asked, the Grievor understood that employees accept responsibility for wage claims

submission and wage claims submission must be made that apply to the terms of the Collective Agreement.

7. The Company considers the issue of theft, fraud, or the authorized taking of time a serious offence and considers the discipline assessed was justified and warranted in these circumstances.

8. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION	FOR THE COMPANY
"D. Edward"	"Lauren McGinley"
For: Dave Fulton General Chairman TCRC CTY West	Assistant Director Labour Relations Canadian Pacific

January 7, 2022

Hearing: February 17, 2022 - By video conference

APPEARANCES

FOR THE UNION:
Ken Stuebing – Counsel, Caley Wray
Dave Fulton – GC CTY West
Doug Edward – Sr. VGC CTY West
Ryan Finnson – VGC CTY West
John Kiengersky – VGC CTY West
Jaimie Lind – VLC Revelstoke
Troy Woodhouse – Grievor

FOR THE COMPANY:
Lauren McGinley, Assistant Director Labour Relations
Mr. John Bairaktaris, Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] On August 5, 2019, the Grievor, Mr. Troy Woodhouse worked as the Conductor on train 865-098 ordered at 08:10h out of Revelstoke, BC. As a result of rest enroute provisions, the crew was relieved enroute at Chase, BC and taxied to the away from home terminal of Kamloops, BC.

[3] Upon arrival at the away from home terminal, the Grievor input his tie-up and off duty times. The Grievor later modified his tie-up time. The change resulted in an $80.00 premium payment due to the it being over 10 hours. The modified submission and claim subsequently triggered the investigation.

[4] On August 27, 2019, the Grievor was issued a notice to appear in connection with his tour of duty on train 865-098 on August 5, 2019 and more specifically his off duty time. An investigation was held on August 29, 2019. Following the investigation, the Grievor was dismissed on September 16, 2019.

[5] The Company relies on railway cases CROA 461, 899, 1472, 1474, 2304, 1835, 2280, 4280, 4735, 4746, 4764, and SHP 444. The Union relies on railway cases CROA 3614, 3409, 2854, 4362, Ad Hoc 657 and 723.

ANALYSIS AND DECISION

[6] CP Rail submits that all TCRC represented Train & Engine employees in Canada work under the Honour System that has been in place for over 20 years. It says running trades employees at CP work in a unique position of trust and are responsible for their own time reporting and wage claims. False time entries that trigger fraudulent payments are, in the Company's view, considered to be of the utmost seriousness and grounds for termination of employment. It says that in addition, when employees give notice to book rest, the Company makes arrangements to ensure the employees are off duty within 10 hours. This is a contractual obligation and failure to comply results in penalties against the Company.

[7] The Company submits that the Grievor claiming he was Over 10 Hours and thereby triggering false wage submissions is not an innocent error but rather it is an attempt at theft. It says the Grievor knowingly entered incorrect off-duty times which triggered a fraudulent $80 payment and logged an over hours violation against Canadian Pacific. The Grievor's actions breached the bond of trust necessary for employment and, as such, the Company submits that termination was the proper penalty under the circumstances.

[8] CP submits that although Grievor originally entered inaccurate relieved and arrival times into CMA, the times he entered did not generate an over 10 premium payment of $80 or an over 10 violation against the Company. It says that 10 minutes after entering the first in accurate off duty time of 18:10, the Grievor intentionally changed the Off Duty time to 18:15. The new time entry, then generated an $80 premium penalty payment and wrongfully indicated an over 10 violation against Canadian Pacific.

[9] The Company submits that the investigation confirmed that in addition to the Grievor's flawed logic, he did not seek clarification from his TCRC Local Union Representative, did not consult with a Company officer to validate the legitimacy of his actions and did not submit an IP claim to have an auditor review his entry. Moreover, the Grievor did not consult with his Locomotive Engineer when tying them both up. The Grievor simply acted on his own accord for monetary gain. It says the Grievor's explanation for knowingly entering false time values, for very specific operational events, defies credulity.

[10] CP says the Grievor was aware of the proper procedures, or who to contact if he was uncertain, yet he claimed his absurd interpretation of the Collective Agreement caused him to alter his tie-up to trigger payment. The Company submits that the Grievor's lack of credibility is even more starkly apparent when compared with that of his Locomotive Engineer who in reviewing his time slip inquiry entered by the Grievor noticed that the off duty time was changed. He then changed the ticket to reflect the original off duty time of 18:10.

[11] The Union argues that the matter is not as simple as set out by the Company. It says that when the RTC determined that the crew would not be able to make it to Kamloops and be off duty in the required 10 hours, a relief crew was ordered for Train 865-09. Arrangements were made for a crew change off at Chase, B.C. Chase is a controlled location with a siding, located approximately thirty-five miles east of Kamloops. The agreed to Shuswap Transit Times Document shows the transportation time from Chase to Kamloops to be 55 minutes.

[12] After the crew completed a proper change off at Chase, Conductor Woodhouse and Locomotive Engineer entered the Halcon van at Chase. They recorded their entry time in the van with the driver. Conductor Woodhouse's watch indicated that the crew entered the van at Chase at 17:20 hours, with 50 minutes remaining in his 10 hours. The van then proceeded to Kamloops to the crew rest house. Upon arriving at Kamloops, Conductor Woodhouse and the Locomotive Engineer tied up their wage claim for the tour of duty, booked their desired rest and reported a tie up time of 18:10—5 minutes short of the 55-minute transit time from Chase to Kamloops set forth in the agreed upon Shuswap Transit Times document.

[13] The Union submits that Article 18.17 has a bearing in this matter, regarding the application of the rest articles as they apply to rest enroute. The Article sets out:

> Article 18.17 IN AND OFF IN 10 HOURS - PENALTY
> The Company is committed to work with the Union with a view of eliminating over hours violations. In addition, to address its concerns, the following will apply in the event employees are not in and off within the 10 hours as specified in the Collective Agreement.
> (1) When employees provide proper notice of rest to be in and off in 10 hours specified in the Collective Agreement and **have not arrived at the objective terminal within 10 hours, the $80.00 penalty payment is paid**….. **Emphasis Added**

[14] The Union submits it is clear that the intent of Article 18 is to have employees in and off within 10 hours on duty. What Article 18.17 clarifies, inter alia, is the application of agreed transit times on this right. It says the transit times will be based on the departure time of the taxi from the relief point to arrival time at the off duty point at the objective terminal and includes a standard tie up time. The Union submits that Article 18.17 appears to provide that the parties intended the agreed Transit Times to be incorporated in the determination of whether a crew is in and off duty in 10 hours.

[15] Mr. Woodhouse's understanding was that, under the Collective Agreement, he was entitled to rely upon the Transit Times in determining his off-duty time. Following the initial tie up, Conductor Woodhouse consulted the Collective Agreement Article 18.17. He determined that the language allowed him to enter an off-duty time for the crew to allow for the 55-minute transit time from Chase to Kamloops rather than the actual 50 minutes it had taken. With the 55-minute transit

time, and his recorded time entering the cab at Chase at 17:20, he genuinely understood his assignment to have exceeded 10 hours on duty.

[16] The Union noted that both crew members were eventually called for their respective tour of duty back to Revelstoke, and notably they worked together on the return trip. Following checking his records, the Locomotive Engineer went into the CMA system and changed his off-duty time for that tour of duty back to 18:10. At no point did the Locomotive Engineer discuss with or offer guidance to Mr. Woodhouse regarding Mr. Woodhouse's interpretation of the Collective Agreement.

[17] I am far from convinced by the Grievor's explanation of what occurred. This is not solely about 5 minutes. The Grievor unilaterally interpreted the agreement to permit that published transit times be taken no matter how much in advance the crew arrives at the final terminal. He determined this and changed his claim without any consultation with the Locomotive Engineer, the Company or the Union.

[18] The Union infers the Locomotive Engineer should have told Grievor that he changed his time back to the original arrival. I disagree with that position. I find it would have been more appropriate for the Grievor to consult with the Locomotive Engineer before changing the off duty time to determine if he agreed with the Grievor's interpretation.

[19] The Union argues that the Company has advanced a new allegation not previously set forth in its JSI or Form 104, that the "Grievor input his tie-up using false relieved and off duty times." The Union objects to this expansion/alteration of grounds. The relieved times are not alleged whatsoever in the Form 104. Likewise, the Company alleges breach of the bond of trust, which is not set forth as a ground in the Form 104.The Union relies on Aerocide Dispensers Ltd. v. United Steelworkers of America (Walker Grievance), [1965] O.L.A.A. No. 1, the leading, often-followed statement of the law regarding alteration of grounds.

[20] The Union argues that the Company should be held fairly strictly to the grounds upon which it chosen to act and not be permit an assigned cause to be reformed into one different from it merely because the evidence does not support the assigned cause. In this case I find the Company's submissions regarding the reasons for dismissal clearly relate to those initially proffered, and existed at the time the Company determined the discipline to be assessed the Grievor.

[21] In this case the Grievor initially submitted the correct time of arrival at the objective terminal. He later changed the time after considering the provisions of the collective agreement. The interpretation he chose to apply is inconsistent with the wording of the collective agreement. He did not consult the Locomotive Engineer or his Union.

[22] After carefully reviewing the parties' submissions and jurisprudence I am satisfied that the Company met its burden of proof for discipline. However, there are additional unique factors to be considered with respect to the appropriateness of dismissal.

[23] While the Company maintained that it had just cause to terminate the Grievor's employment as a result of this incident it later reconsidered the dismissal. It says that as a matter of managerial leniency, it offered to reinstate the Grievor on last chance terms on November 23, 2020. This offer was declined by the Grievor and his Union on November 24, 2020.

[24] Without prejudice or precedent to the Company's position in this case, following the Grievor's declination of the reinstatement agreement, the Company decided to unilaterally

reinstate him to Company service. To this end, Superintendent Brad Templeton contacted the Grievor at his last known phone number. On December 3, 2020 at 09:00, a female answered the call and said she would have the Grievor call Mr. Templeton back. Mr. Templeton again attempted to contact the Grievor on December 4, 2020 at 11:00, leaving a voicemail. On December 5, 2020, Mr. Templeton again attempted to contact the Grievor at 10:00.

[25] On February 5, 2021, Superintendent Templeton confirmed Mr. Woodhouse had never called him back. Accordingly, on February 8, 2021, General Chairman Dave Fulton was advised of the Grievor's failure to respond to the Company's unilateral reinstatement. There is no dispute that the Company unilaterally attempted to contact the Grievor and offer him reinstatement. This occurred when the Union had carriage of a grievance, pursuant to its status as bargaining agent. That status provides the Grievor with access to the expertise applicable to his grievance.

[26] There is no agreement between the parties with respect to what specifically occurred between February and October 2021. It was not until October 18, 2021, almost a year after the Company's attempt to unilaterally reinstate the Grievor, and notably, following the 2-year mark with respect to his pension that proper discussion began. However, based on the foregoing, the Company submits the Grievor forfeited his right to seek reinstatement to employment with the Company when he refused, through his own and his Union's inaction, to return to work in December 2020.

[27] The Company maintains no compensation would be appropriate in the circumstances. The Grievor had an opportunity to mitigate all losses at that time and failed to seize the opportunity.

[28] The Union argued that multiple attempts to unilaterally reinstate the Grievor are inconsistent with CP's present position that culpability of theft was established and dismissal was appropriate in all the circumstances. The Company's post-discharge about-face speaks volumes to the contrary.

[29] Based on the evidence, I cannot find that Mr. Fulton accepted the Company's suggestion of reinstatement without compensation as suggested. I find that the Grievor initially placed himself in a position which attracted significant discipline. He submitted a time claim correctly and then changed it incorrectly to attract an $80.00 over 10 hours payment despite the clear wording of the collective agreement. He chose not to consult with his locomotive Engineer when he changed his claim. Had the Locomotive Engineer not changed his claim when he noticed the wrong time he may have been subject to a disciplinary investigation.

[30] I cases such as this Arbitrators may provide decisions which provide caution to a grievor against repeat of the found wrongdoing when reinstated. Arbitrators want to satisfy themselves that the grievor has learned from his errors and is confident they will not be repeated. Given the facts of this case I have significant concern in that regard. That said, the Company was willing to reinstate the Grievor and I see no reason to deprive him of the opportunity to return to CP Rail.

[31] Following his termination the Grievor failed to keep his Union or the Company of his contact information. He moved out of province and could not be initially reached. I find that much of the Grievor's misfortunes are largely consequences of his own doing. That said, the Company chose to offer reinstatement and attempted to approach the Grievor directly when the Union had carriage of his grievance. The Grievor would have been reinstated December 3, 2020 had he agreed at that time.

[32] After consideration of all of the foregoing the grievance is allowed in part. The Grievor Troy Woodhouse will be reinstated in accordance with the following. The period from August 5, 2019 to July 5, 2021 will be counted as time out of service without compensation. Upon return to work at CP Rail, he will be compensated for lost time and benefits for the time from August 5, 2020 to December 3, 2020 when he refused reinstatement.

[33] I remain seized with respect to any matters regarding the application or interpretation of this award.

Dated this, 9th, day of April, 2022.

Tom Hodges
Arbitrator