

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*  
*1985, c L-2.*

**BETWEEN:**

**TEAMSTERS CANADA RAIL CONFERENCE**

**(TCRC)**

**-and-**

**CANADIAN NATIONAL RAILWAY COMPANY**

**(CN)**

**Discharge Grievance (Accumulation of Demerits) Of Conductor Geoffrey Weseen**

**Arbitrator:** Graham J. Clarke  
**Date:** November 3, 2022

**Appearances:**

**TCRC:**

K. Stuebing: Legal Counsel  
R. Donegan: General Chairperson, Saskatoon  
J. Thorbjornsen: Vice General Chairperson, Saskatoon  
G. Weseen: Grievor, Winnipeg

**CN:**

L. Dodd: Labour Relations Manager  
V. Paquet: Senior Manager, Labour Relations  
S. Bahl: Superintendent  
R. Singh: Labour Relations Manager  
A. Bacchus: Labour Relations Manager

Arbitration of 4 separate grievances held via videoconference on October 12, 2022.

# Award

## Background

1. The parties included a Letter of Understanding in their November 26, 2019, Memorandum of Settlement which established a “Supplemental Arbitration Process” (SAP). The SAP obliged the parties to follow the rules and procedures of the Canadian Railway Office of Arbitration & Dispute Resolution<sup>1</sup> (CROA). The arbitrator agreed to provide 4 hearing dates in 2022 on the condition that the parties would plead no more than 2 cases per day<sup>2</sup>.

2. For Mr. Weseen’s 5 grievances heard on October 12, 2022, the arbitrator has issued this award (AH792) concurrently with the related award AH793. While the particularities of railway arbitrations sometimes create separate cases, AH793 and AH792 are partially interconnected since the two awards examine some of the same events.

3. This award concerns 4 different disciplinary events.

4. For the reasons given below, the arbitrator has modified the penalties CN imposed. AH793 has already set out the conditions attaching to Mr. Weseen’s reinstatement.

## Analysis

### Introduction

5. At the time the 4 separate incidents occurred, Mr. Weseen had 35 demerit points on his record<sup>3</sup>. Termination occurs when an employee reaches 60 demerit points.

6. The challenge in this case has been examined more fully in the companion award AH793 where CN terminated Mr. Weseen for, *inter alia*, a violation of Rule G. In AH793, CN acknowledged at the hearing that Mr. Weseen suffered from a disability. The analysis of a case changes fundamentally depending on whether it is a disciplinary case or one involving accommodation due to a disability. The proper characterization also leads to different burdens of proof for the parties.

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<sup>1</sup> [Croat.com](http://Croat.com)

<sup>2</sup> Hearing Notice dated May 7, 2021.

<sup>3</sup> Ex-2 CN Exhibits; Page 6/300

7. In the instant case which deals with 4 separate grievances, the TCRC asked the arbitrator to consider Mr. Weseen's situation as explored more thoroughly in AH793. CN in its oral reply suggested that the TCRC had provided "no evidence of disability".

8. The arbitrator agrees with the TCRC that a disability forms part of the backdrop for one of the 4 incidents in this award (Bootlaces incident; 15 demerits). However, for the other three grievances, which took place earlier, the TCRC did not demonstrate that any medical issue impacted them. The arbitrator also notes that the JSI<sup>4</sup>, unlike in AH793, makes no mention of a disability.

9. Accordingly, the arbitrator will evaluate the 3 incidents, other than the bootlace incident, based solely on the JSI to which the parties agreed. The arbitrator will review the incidents in chronological order.

#### **7-Day Suspension for August 10, 2019 Incident**

10. CN held Mr. Weseen out of service starting on August 7, 2019 because his First Aid qualification had expired<sup>5</sup>. Mr. Weseen explained that he had scheduled three attempts to take the recertification course but failed to attend them due to illness on one occasion and being at work for the other occasions<sup>6</sup>.

11. Mr. Weseen added that being on SLE training<sup>7</sup> had made it more difficult for him to attend the course, something which would not happen when performing his regular Yardman duties<sup>8</sup>.

12. Mr. Weseen advised CN that in the future he would ensure he requalified before his certificate expired<sup>9</sup>.

13. CN later imposed a 7-day suspension due to Mr. Weseen's failure to renew his First Aid qualification prior to its expiration date. CN imposed a suspension given that at

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<sup>4</sup> Ex-4; TCRC Exhibits, Tab 1

<sup>5</sup> Ex-2 CN Exhibits; Investigation QA 8; Page 117/300; JSI page 2/300.

<sup>6</sup> Ex-2 CN Exhibits; Investigation QA 9-10; Page 117/300

<sup>7</sup> Ex-2 CN Exhibits; Page 128/300; Collective agreement article 148.11 requires conductors to take locomotive engineer or traffic coordinator training.

<sup>8</sup> Ex-2 CN Exhibits; Investigation QA 16; Page 118/300

<sup>9</sup> Ex-2 CN Exhibits; Investigation QA 14; Page 118/300.

the time Mr. Weseen's demerits stood at 55. A suspension allowed him to keep his employment<sup>10</sup>.

14. The TCRC argued that the incident occurred in part due to Mr. Weseen's participation in SLE training. This prevented him from having a regular schedule. It also took issue with CN not allowing employees to book off to attend recertification until they arrived at the course<sup>11</sup>.

15. CN has satisfied the arbitrator that it had grounds to discipline Mr. Weseen. Employees are responsible for ensuring that their First Aid qualifications remain up to date so that CN can call them for work.

16. However, the suspension appears harsh. Mr. Weseen had apparently requalified by the afternoon of August 11, 2019. CN conducted its interview on September 12, 2019 and kept Mr. Weseen out of service until September 18, 2019. He was then assessed a 7-day suspension (time served) and returned to active duty<sup>12</sup>.

17. Given these facts, the arbitrator substitutes a 1-day suspension as the appropriate penalty. CN will compensate Mr. Weseen and amend his employment history to reflect this reduction in his suspension.

### **20 Demerit Points: Missed Call September 7, 2019**

18. On April 25, 2019, Mr. Weseen signed CN's "Western Canada Locomotive Engineer – Training Conditions" contract<sup>13</sup>. This contract related to collective agreement article 148.11 which requires conductors to train as locomotive engineers or traffic coordinators.

19. On September 7, 2019, apparently while training with his father who is a CN engineer<sup>14</sup>, Mr. Weseen missed a call. CN imposed 20 demerits for the missed call.

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<sup>10</sup> Ex-1 CN Brief; Paragraph 46.

<sup>11</sup> Ex-3 TCRC Brief; Paragraph 44.

<sup>12</sup> Ex-2 CN Exhibits; JSI page 2/300.

<sup>13</sup> Ex-2 CN Exhibits; Page 131/300.

<sup>14</sup> Ex-4 TCRC Exhibits; Investigation QA 8-9 page 78/273.

20. Mr. Weseen candidly acknowledged his failure to advise ESO Eddy Watt if he could not attend work<sup>15</sup>. He also advised CN of his struggles with the SLE program<sup>16</sup>:

I do understand that I was not compliant with the Contract I signed for the SLE Program. I did the best I could with the way the program was effecting (sic) my life and should have spoken to ESO Eddy rather than let it get to where it is at today.

21. CN has demonstrated it had grounds to impose discipline. Missing a call without justification has serious consequences for CN's operations.

22. However, the arbitrator views this incident in a somewhat different light compared to other situations where an employee simply misses a call. This is not a situation where an employee slept in and failed to respond to CN's call for work.

23. While the Record is not entirely clear, it appears Mr. Weseen may have been training, or getting ready to train, under the SLE program at the time the call came:

8. Q. Mr. Weseen, Company records show that on Saturday September 07, 2019, you missed a call for Duty on Train A43841-07. Please explain why missed this call for duty?

A. I was not expecting the call as I was paired up with a Sioux Engineer and was protecting his turn.

9. Q. Mr. Weseen, what assignment were you working in when you missed this call for service?

A. I was paired up with a Sioux Engineer Dave Weseen my father. His turn was WS14.

...

13. Q. Mr. Weseen, did you call the Crew Office back after you missed the call for service on A43841-07?

A. No I was not expecting the call nor did I see it until after the fact. I was corresponding with my Dad and knew when I was going to go to work.

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<sup>15</sup> Ex-4 TCRC Exhibits; Investigation QA 21-22 page 79-80/273.

<sup>16</sup> Ex-4 TCRC Exhibits; Investigation QA 27-28 page 80/273.

24. Given this context, the arbitrator reduces the penalty imposed from 20 demerits to a written warning.

**25 Demerit Points: Missed call due to power outage: October 12, 2019**

25. On October 12, 2019, Mr. Weseen missed a call and arrived late at work. At his subsequent interview, he blamed the incident on a massive storm in Winnipeg which knocked out the power<sup>17</sup>:

8. Q. Mr. Weseen, Company records show that on Saturday October 12, 2019, you failed to report for your 07:00 E-Tower Assignment and were placed into the AWOL status. Please explain why you failed to report for duty?

A. This was due to the big storm that knocked out power all over the city including mine. The power went out and my alarm clock reset. It did not go off, I woke up 09:30 and say my alarm did not go off and called the Crew Office (sic).

26. CN imposed 25 demerits for the missed call/late arrival.

27. The TCRC suggested that Mr. Weseen did not engage in culpable behaviour<sup>18</sup>:

114. It is respectfully submitted that any reasonable application of the considerations articulated by Arbitrator Picher above to the facts of the instant case leads to the conclusion that the impugned conduct of Conductor Weseen does not constitute culpable conduct warranting discipline.

...

119. Applying the foregoing facts to Arbitrator Picher's framework, it is evident that the Grievor's lateness on October 12, 2019 was caused by an "unforeseen emergency" and beyond the control of the Grievor. Further, the Grievor provided a justifiable explanation for his late arrival on the day in question.

28. CN has clearly demonstrated that it had grounds to discipline Mr. Weseen for arriving late for work. A major snowstorm is not an unforeseeable event. Moreover, those working in time sensitive businesses have multiple back up methods to ensure a power outage does not impact their ability to get to work. For example, Mr. Weseen could have used a battery powered alarm clock or a smart phone.

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<sup>17</sup> Ex-4 TCRC Exhibits; Investigation QA8 page 140/273.

<sup>18</sup> Ex-3 TCRC Brief.

29. However, the arbitrator concludes that 25 demerits was excessive for this incident. Arbitrator Picher's award in [CROA 3091](#), a decision which also reviewed multiple incidents for a terminated grievor, upheld an assessment of 15 demerits for a situation comparable to the one under review:

Mr. Chumm, an employee of some seventeen years of service, has a less than enviable record with respect to timekeeping over the years. On a number of occasions he received previous discipline, or corrective interviews, for either reporting late or booking unfit after he had accepted a call. In light of that record, and accepting that the grievor must be held responsible for his own failure to attend at work on time on April 21, 1999, the Arbitrator is satisfied that the fifteen demerits assessed is within the appropriate range of discipline, and should not be disturbed. Therefore this part of the grievance must be dismissed.

30. The arbitrator substitutes 15 demerits for the 25 demerits CN imposed for this incident.

### **15 Demerit Points: Boot laces: October 19, 2019**

31. The arbitrator's decision in AH793 has already determined that this incident ought to have been treated in accordance with human rights principles. Mr. Weseen suffered from a disability and the appropriate analysis should have focused on whether he could be accommodated without undue hardship.

32. Since discipline was not appropriate for this incident, the arbitrator orders CN to remove this incident and the 15 demerits from Mr. Weseen's disciplinary record.

### **Disposition**

33. While CN has met its burden to demonstrate that it had cause to impose discipline in 3 of the 4 incidents under review, the TCRC persuaded the arbitrator to modify that discipline. For the reasons given above, the arbitrator orders as follows:

1. First Aid: CN will reduce the 7-day suspension to 1 day and compensate Mr. Weseen accordingly;
2. Missed call; SLE training: CN will reduce the penalty imposed from 20 demerits to a written warning;
3. Missed call; arriving late for work: CN will reduce the penalty imposed from 25 demerits to 15; and
4. Bootlaces missing: Given the award in AH793 which found discipline inappropriate for this type of situation, CN will remove this incident and the 15 demerits from Mr. Weseen's disciplinary record.

34. The arbitrator remains seized for any issues arising out of this award.

SIGNED at Ottawa this 3<sup>rd</sup> day of November 2022.

A handwritten signature in black ink, appearing to read 'G. Clarke', written in a cursive style.

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Graham J. Clarke  
Arbitrator