IN THE MATTER OF AN ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE

(the Union")

and

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

DISPUTE:

Appeal of the dismissal of Conductor Shawn Arnold of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE

Following a formal investigation, Mr. Arnold was dismissed which was described as "You are hereby dismissed due to your inappropriate wage claims under the Honour System as determined by the Formal Investigation into your wage claims between 2016 and 2020."

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement establishing the CROA&DR.

UNION POSITION

The Union submits that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement based on the following allegations:

- The Investigating Officer, John Bell, is alleged to have been biased and not impartial as Mr. Arnold's wages were charged to Mr. Bell's cost center and Mr. Bell had a direct personal benefit contingent on budget outcome;
- The Union objected to Mr. Bell as the Investigating Officer and Mr. Bell chose not to recuse himself;
- Conduct of the Investigating Officer; Q&A 67 - 78
- Questions and/or evidence denied entry to the record (Q&A 47, 52, 58, 67, 70-78, 154, 158-159,334, 391,386,428,451);
- Timeliness of the Investigation (Q&A 95, 256-263, 267, 272, 287-288, 295, 300, 303, 370, 373-375);
- Company witnesses' contradictory testimony; and,
- Summary question at Q&A 459.

As a result, the Union contends that the discipline must be considered void ab initio.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment, or any related presumption of theft and/or fraud. The Union maintains there is no evidence that Mr. Arnold submitted wage claims for which he was not entitled for work performed.

In the alternative, the Union contends that Mr. Arnold's dismissal is unjustified, unwarranted

excessive in all of the circumstances, including the mitigating factors of:

- Failure to properly identify actual cause of dismissal
- Refusal to acknowledge that all instances of overtime were properly substantiated.
- Mr. Arnold's account as relayed in Q&A 474 of the investigation

The Union requests that Mr. Arnold be reinstated without loss of seniority and benefits, that the discipline be removed in its entirety, and that Mr. Arnold 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

The Company disagrees and denies the Union's request.

The Company maintains the Griever's culpability was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that Union describe as mitigating.

The Union has alleged the griever's statement was unfair and partial. The Company cannot agree with the Union's allegations. General Manager Prairie South John Bell was chosen to investigate this matter, as it was a highly complex investigation that required a highly skilled investigating officer. In his role as investigating officer, Mr. Bell was required to determine relevance of the griever and/or his Union Representative's requests and did so on multiple occasions. Any allegation that he coerced the griever is entirely unfounded and negated by the fact that the griever had Union representation throughout the investigation.

Regarding burden of proof and the allegation that the 104 did not identify actual cause of dismissal, the Company need only point to the Honor System.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. The Company maintains the discipline was properly assessed under the Company Hybrid Discipline & Accountabilities Guidelines. Violations are clearly listed and, following the fair and impartial investigation into this matter that determined culpability for the violations list in the discipline letter, the grievor was assessed discipline in accordance with these Guidelines.

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 Dave Fulton
General Chairman
TCRC CTY West

FOR THE COMPANY:

Chris Clark
Manager Labour Relations
Canadian Pacific Railway

October 24, 2022

Hearing by Videoconference: November 15, 2022

APPEARANCES
FOR THE UNION:
Ken Stuebing, Counsel, Caley Wray
Dave Fulton, GC CTY West
Doug Edward, VGC CTY West
Ryan Finnson, VGC CTY West
Jason Hnatiuk, Vice General Chairperson
Warren Zimmer, Local Chairman Moose Jaw
Brad Wiszniak, Local Chairperson, Regina
Shawn Arnold- Grievor

FOR THE COMPANY:
Chris Clark, Manager Labour Relations
Lauren McGinley, Assistant Director Labour Relations
Trisha Gain, Legal Counsel
Gurjit Gill, Specialist T&E Honour System Audit

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 briefly reviewed the extensive documentary evidence and made final argument within the agreed time limits set by them. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

2. The Grievor, entered service with CP in 1994 as a running trade employee. In August of 2009, the Grievor was diagnosed with an illness that prevented him from working his regular Train & Engine duties. He was subsequently accommodated in 2014 in the Moose Jaw mechanical department as a fuel clerk. In 2015, the Grievor worked on a special project cataloguing parts for CP locomotives. At the time of dismissal, the Grievor was working in another accommodated position within the Moose Jaw car department. On June 30, 2020, the Grievor was advised that he was required to attend an investigation on July 2, 2020 in connection with wage claims between February 23rd, 2016 and May 15th, 2020.

3. At the outset of the investigation which began on July 7, 2020, the Grievor's Union Representative, Warren Zimmer, objected to the investigation stating:

> The Union objects to this investigation in its entirety as the notice to appear was served in an unrealistic amount of time after the alleged incident. It is

> unfair to expect Mr. Arnold to recall the facts after this time has passed. The arbitrator has ruled on this in CROA 1588.

4. The investigation which began on July 7, 2020 concluded on September 8, 2020. The Grievor was dismissed by letter on September 22, 2020 stating:

> You are hereby dismissed due to your inappropriate wage claims under the Honour System as determined by the Formal investigation into your wage claims between 2016 and 2020.

5. It is not in dispute that the Grievor understood the Honour System. The system is clear in setting out the accountability of the employee submitting their wage claims within the 59-page Honour System Manual by providing:

> **The Honour System**
>
> Under the Honour System all Train & Engine Employees are responsible for their own payroll.
> Most timeslips are automatically approved and paid, and are subject to audit at a later date by Audit Specialists. As your own timekeeper, **you are responsible** for your timeslips (even if submitted by a fellow employee), and you must make every effort to understand and apply your Collective Agreement, this Manual and instructions provided by the Company from time to time. With CMA (Crew Management Application), you make your own adjustments (see "Adjusting Timeslips").
>
> **You are your own timekeeper.**

6. The Honour System also sets out audits, investigations, adjustments and recovery of money owing as outcomes for submitting inappropriate claims setting out:

> **AUDIT PROCEDURE**
>
> **Outcome of an Audit**
>
> An audit could result in an adjustment in your timeslip. If the audit shows you have been overpaid, a recovery of the funds will be authorized by the Audit Specialist.
>
> The Audit Specialist will inform you of the adjustment through remarks included on the adjusted timeslip with reasons why the adjustment is necessary. If you have been overpaid, your timeslip will be adjusted accordingly in order to recover the money owing to the Company (it may be the full amount at once).
>
> **Important**: Employees must remember that incorrect or inappropriate claims that require adjustment may also be subject to formal investigation if warranted.

7. The issue of the Grievor's overtime claims began following a Memorandum to file providing:

Date: June 9, 2020
Name: Dwayne Westgard
Re: Shawn Arnold OT Claims

To whom it may concern

Shawn Arnold has never been required nor forced to work overtime over the past 4 years while working in the Mechanical Department in his return to work plan. Over this time, I can remember 10-12 occurrences that could have generated or warranted an overtime claim by Mr. Arnold as I had given direction to have certain tasks that needed to be completed.

Mr. Arnold has never approached myself personally outside of these 10-12 occurrences and requested to work overtime. These are the only occurrences that I am aware of that an overtime claim may have been made.

Dwayne Westgard
Supervisor Mechanical
Moose Jaw

8. The following day a second Memorandum to file by Manager of Mechanical provided:

Date: June 10, 2020

Name: Samuel O'Reilly-Towle
Re: Shawn Arnold OT Claims

To whom it may concern

Mr. Arnold worked at the car shop for approximately 4 years before being brought back to the running trades to assist in yard duties on May 26th, 2020. Since I started in November I can recall two instances that he would have been required to work beyond is scheduled 8 hour shift. One occurrence was to bring parts to Regina so we could assemble a set of trucks on a derailed car. The second occurrence was to bring parts to Sutherland and bring an air machine back.

Other than these two occurrences, Mr. Arnold was not required nor asked by myself to work overtime since starting my position in November 2019.

Since my arrival in November of 2019, no other supervisor who directly reports to myself has requested overtime to be worked by Mr. Arnold.

Samuel O’reilly-Towie
Manager Mechanical
Saskatchewan

9. Following the two memos, Scott Watkins, T&E Honour System Audit responded on June 26, 2020 to a request by John Bell, General Manger for information regarding the four years of claims. The investigation then began on July 7, 2020.

10. The evidence established that the Grievor originaly returned to work after signing the following:

RETURN TO WORK PLAN

EMPLOYEE NAME: Shawn Arnold EMPLOYEE#: 687649
SUPERVISOR NAME: Greg Squires
Preinjury Job: Conductor Location: Moose Jaw

TITLE/DESCRIPTION OF MODIFIED WORK:

Shawn will complete general cleaning and other duties within the restrictions of:

- Light strength for pushing, pulling, lifting and carrying
- Occasional Uneven ground
- Restricted from Safety Critical and Safety Sensitive positions
- Restricted from operating moving equipment/ machinery
- Restricted to driving Company vehicles with no passengers and only on an occasional basis.

NOTE: If you encounter any problems or have any concerns with performing this modified work, you MUST advise your Supervisor Immediately!

FUNCTIONAL LEVEL
LIGHT 1:8) NSSP Only

DATE MODIFIED WORK OFFERED: Feb 22, 2016
LOCATION OF WORK: Moose Jaw START DATE: Feb 23, 2016
WORK HOURS/DAYS OF WEEK: Mon - Fri 8:00-16:00
REVIEW DATE: March 30, 2016
*WAGE RATE $ 268.66 Daily
*Employees are paid for actual hours worked only.
END DATE: May 23, 2016
We are pleased to offer you a modified work assignment as described above in accordance with the functional restrictions and abilities outlined by your health care professional and/or OHS.

11. The document was signed February 23, 2016 by the Grievor and Scott Bugg, his supervisor at the time. The Company maintained that the Return To Work Plan is a contract under which no unauthorized overtime is permitted. Days of work are Monday to Friday with no unauthorized weekend overtime work permitted.

12. It is not in dispute that after the first year of working in his accommodated position his claims for overtime began to increase in accordance evidence setting out the following:

Year	Hours of OT to May 15, 2020	Working days	Days with Overtime Claimed	% of Working Days where Overtime was Claimed
2016	0	216	0	0 %
2017	147	252	78	**31 %**
2018	481	232	208	**90 %**
2019	676	226	219	**97 %**
2020 to May 15	396	96	96	**100 %**
Total	1700	1022	601	**59 %**

13. The Company maintains the Grievor's culpability was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that the Union describe as mitigating.

14. The Company submitted that some people steal as a means to survive due to economic hardship. Others simply enjoy the rush of stealing, or steal to fill an emotional or physical void in their lives. Stealing may be caused by many factors. One thing for sure is there is no nexus between theft and an employee's discipline record. An individual's decision to steal is based on opportunity and their evaluation on the probability of being caught.

15. CP maintained that in this case, the employee inappropriately paid himself overtime where there was no entitlement. The Grievor was able to do this undetected because he had:

- Knowledge: of the CMA Honour System of Pay;
- Opportunity: his fraudulent submissions were only subject to a random audit and were unbeknownst to his supervisors; and
- Motivation: the latitude to achieve monetary gain with ease.

16. The Company submitted that on July 7, 2020, it began an investigation into the Grievor's wage claims associated with his RTW plan and accommodated position within the Moose Jaw mechanical car shop. It says it relies on the statement in its entirety. The Company argued that in order to prove culpability and that the penalty of dismissal was appropriate in the circumstances, it only needs to rely on one example. The investigation contains several.

17. CP explained that in 2016, the Grievor worked a total of 216 days, claiming no overtime. Not once was he asked to stay for overtime to complete tasks after his regularly scheduled shift. This is important to note considering the Grievor claims that, in the subsequent years to follow, he was allegedly relied upon to perform overtime on nearly a daily basis to complete his tasks.

18. In 2017, the Grievor worked 252 days and claimed overtime on 78 days. In 2018, the Grievor's overtime submissions continued to grow. He claimed overtime on 208 days while having worked a total of 232 days. In 2019, the Grievor claimed overtime on almost every shift that he worked. Working 226 days and claiming overtime an astounding 219 times as the brazenness continued. In 2020, when the Company had finally become aware of the Grievor's actions and improbable overtime submissions, he was claiming overtime for every shift that he worked.

19. The Union submitted that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. It argues that the investigation was not timely. It was taken totally by surprise in the heavy-handed and arbitrary fashion in which CP essentially revoked the longstanding conditions of Mr. Arnold's ongoing accommodation. There is an obvious and intractable prejudice to Mr. Arnold in the greater than four-year scope of wage claims that were suddenly subject to review. Indeed, it is self evident that, given the subject matter and scope of the investigation, the notice to appear was served after an unrealistic amount of time. As a result of a time frame of over four years, it says Mr. Arnold was prejudiced in his ability to properly supply accurate facts for this investigation.

20. The Union argued that the Investigating Officer, John Bell, was not impartial as Mr. Arnold's wages were charged to Mr. Bell's cost center and he had a direct personal benefit contingent on budget outcome. The Union objected to Mr. Bell as the Investigating Officer and he chose not to recuse himself. It says he continually asked leading questions of witnesses, ignored objections, denied relevant evidence into the record from bargaining unit employees and allowed Company Officers to contradict their own testimony without question.

21. CP submits that the Union's position of an unfair and biased investigation is not only false, but it is misleading and a poor attempt to absolve the Grievor from any wrongdoing. Regarding

the allegation that the Investigating Officer was influenced because the Grievor's inappropriate wage submissions were charged to the Investigating Officer's cost centre and that he had a personal benefit on budget outcome CP says this is simply illogical. If this logic was to be relied upon, Mr. Bell could not investigate any employee within his organizational structure or any derailment or delay to a train as the corresponding costs fall within his budget.

22. The Company noted that any investigation of this nature is done by a local Company Officer under the same cost centre. An operating officer is fact-finding – not undertaking an exercise in accounting revenge. There is not one shred of evidence that points to this assertion. CP maintains that General Manager Prairie South, John Bell, was chosen to investigate this matter, as it was a highly complex investigation that required a highly skilled investigating officer.

23. The Union contends that the scope of the Notice to Appear is hopelessly broad. The subject of the June 30, 2020 Notice to Appear spans a period of over 52 months of wage claims - a scope that is both overly broad and ambiguous. In this regard, the Union referred me to Ad Hoc 521, Arbitrator Picher held that:

> Notice is one of the most essential rights and protections available to an employee facing disciplinary charges. It is important for an employee to know in advance the precise conduct or events which will be the subject of the investigation that may result in their discipline.

24. The Union submitted that the intractable vagueness of the notice dovetails with a more significant concern. It says that, the inexcusable delay in proceeding with allegations as far back as February 2016. The subject of the June 30, 2020 Notice to Appear broadly spans a period of over 52 months. The Union says it is well-established in established arbitral case law that every employee has the right to a timely hearing without undue delay. Investigations under Article 39 are intended to be expedited. Against this context, Mr. Arnold's fundamental right to a timely investigation was breached by the Company waiting more than four years to investigate claims submitted by the Grievor. The Union argues that if it had any legitimate interests in doing so, it ought to have convened a timely hearing as required.

25. The Union relies on the comments of Arbitrator Picher in CROA 3011 regarding the impact of undue delay on a Grievor's recall stating:

> Upon a careful review of the facts, the Arbitrator is compelled to sustain the preliminary position of the Brotherhood with respect to the issue of undue delay in the Corporation's own investigation of the grievor. If, as Mr. Boivin insists, he was innocent of any wrongdoing, it is evident that he would have been substantially prejudiced in his ability to recall and reconstruct the events of December 12, 1996, as the complaint was not brought to his attention, and he otherwise would have had no occasion to think about or recall his encounter with "V", for a period of some seven months. For reasons touched upon in other awards of this Office, including one award interpreting article 73.6, it is inconsistent with the precepts of a fair and impartial investigation for an employer to withhold from an employee a complaint of serious allegations of misconduct for a substantial period of months, thereby depriving that individual from adverting as freshly as possible to the date and incident in question, so as to be able to fairly respond to the allegation made.

> Apart from hampering a person's own ability to recall, such a delay would also hamper, if not destroy, the employee's ability to identify and confer with other persons or witnesses who might assist in his or her defence. These principles have been repeatedly sustained both in this Office and in Canadian arbitration jurisprudence generally (see CROA 2615, 2822, and 2823; Re Corporation of Borough of North York (1979), 20 L.A.C. (2d) 289 (Schiff); Re Brunswick Bottling Ltd. (1984), 2 L.A.C. (4th) 36 (Iwanicki); Re Miracle Food Mart (1988), 2 L.A.C. (4th) (Haefling); Re Air Canada (1993), 34 L.A.C. (4th) 13 (Frumkin); Re Aliments Delisle ltee (1994) 41 L.A.C. 115 (Frumkin).

26. The Union submitted that this same prejudicial effect is evident in the lack of fresh recall by both Mr. Arnold and other witnesses during this delayed investigation. The Company has offered no justification for its undue delay. The breach of Mr. Arnold's substantive rights is inexcusable.

27. The Company objected to the Union's submissions in their entirety. It says they are a misrepresentation of the facts and a disingenuous attempt to distract the arbitrator from the fact that the Grievor fraudulently inflated his earnings. The Union's 78-page submission is an exaggerated and unnecessary verbose exercise in redundancy. They have reproduced at times, only certain parts of the Grievor's statement, in an effort to change the narrative and context from an employee who padded his income with additional, unauthorized payments - to an employee who was entitled to the extra pay because he was "dedicated and provided a wide range of services to the Company. For these reasons, the Company maintained that I must disregard the Union's reproduction of the Grievor's statement in their submissions and only refer to the record which stands as fact. Unlike the statement, the Union's brief does not provide a complete depiction of established facts.

ANALYSIS AND DECISION

28. I have carefully considered the detailed written briefs, together with the submissions and authorities reviewed at the hearing. I have made reference to it as I have needed to throughout this decision. I do not propose to recite the positions of the parties or review all the unrelated facts asserted to issues.

29. I turn to consider the Union's position of prejudice to the Grievor as a result of undue delay. In consideration of delay, it is often presumed that memories fade over time. An inordinate delay after the cause of the alleged disciplinary offence can gives rise to a presumption of prejudice. The presumption of prejudice may be rebutted by evidence provided that all documentary evidence has been preserved. The issues in discipline may be addressed if all necessary witnesses are available with detailed recollection. However, as in this case key people may retire, and key witnesses may no longer be available. Records may not have been properly kept or preserved. Positions can also become more entrenched as time passes. Witnesses may be treated differently and the Union may not be able to adequately survey the issues.

30. Equally important, I recognize that there is a related and fundamental term implied in every contract of employment. The employee is expected to serve their employer honestly and faithfully during the term of their employment. CP has an Honour System of Pay under which this Grievor was paid. The Grievor was an accommodated employee due to medical restrictions. He was working under a Return to Work Plan dated February 23, 2016 that the Company says is a contract.

I agree that it is a major part of the rules under which the Grievor was to comply. That said, it is also recognized as the Union argues, that such rules must be clear, unequivocal and have been consistently enforced.

31. The Union argues that Mr. Bugg, the Manager who implemented the plan did not follow it. He signed the agreement in early 2016 but exited the Company in 2019. He did not give evidence during the investigation, a factor often considered as impacting potential concerns for prejudice of a Grievor. In this case, Mr. Bugg signed the Plan as Manager but did not review it as he had agreed. The Plan set out that:

> Shawn will complete general cleaning and other duties within the restrictions of:
> - Light strength for pushing, pulling, lifting and carrying
> - Occasional Uneven ground
> - Restricted from Safety Critical and Safety Sensitive positions
> - Restricted from operating moving equipment/machinery
> - Restricted to driving Company vehicles with no passengers and only on an occasional basis.

32. The restrictions of the RTW Plan of 2016 were changed but not recorded while Mr. Bugg was supervising the Grievor. At the outset, the evidence confirmed that the Grievor was working an inside Stores position in which the average overtime was approximately 2%.

33. As his duties changed to outside duties while still in Stores, his overtime increased dramatically and deserved scrutiny. While his overtime was not 2% or 7%. It was much closer to those of Rail Car and Diesel Mechanic positions which averaged 7% and were as high as 37% for individual employees. The unchallenged evidence of the Union was that there was as much overtime as employees were willing to work. There was no evidence of investigations or concern for any of the employees at 37% in other departments.

34. I find the concerns that arose in 2020 should have been addressed by a proper review of the Grievor's RTW. I can find no reason why they were not addressed at the time his duties were changed. The Grievor's overtime increased again when he was transferred to operating the crew bus under the Train and Engine department budget with no documentation, review or change to the RTW. The Union argues that the issue of the Grievor's high overtime in a medical accommodation position came into question as a result of that change. A position the Company denies. The evidence confirmed that there were no records of approvals for any of the 1700 overtime hours claimed by the Grievor. However, the Union argues that unlike shop employees, he worked under the Honour System. Under the Shop system, employees are asked to work overtime, usually at the end of their regular shift. It says the Grievor was a running trades T & E employee who work until they complete their assignment, are relieved of duty or book rest. They normally submit claims without overtime approval.

35. In this case, witnesses were giving testimony on situations that began in 2016 and ended in 2020. Witnesses in cases such as this give evidence at investigations in the honest belief that they are telling the truth. However, it is recognized that as time passes memories often fade, which in the absence of supporting documents, evidence can be questioned. Assessing the evidence presented is fundamental to the decision-making process. Arbitrators assess both the credibility and the reliability of the witnesses in their investigation statements and their responses to questions. Evidence that is not credible cannot be reliable. It is also recognized that evidence that is credible may nevertheless be unreliable. Assessing a witness's investigation statement also

considers if it is reasonable and consistent as well as how important inconsistencies may be to the decision.

36. The Company maintained the Grievor's culpability was clearly established following the fair and impartial investigation into this matter and relies on the statement in its entirety. It argued that stealing may be caused by many factors. One thing for sure, it says there is no nexus between theft and an employee's discipline record. An individual's decision to steal is based on opportunity and their evaluation on the probability of being caught. As set out more fully below, I respectfully disagree with that position.

37. The Company also argued that I must disregard the Union's reproduction of the Grievor's statement in their submissions and only refer to the record which stands as fact. It says that unlike the statement, the Union's brief does not provide a complete depiction of established facts.

38. I find the information contained in the Grievor's discipline file also contains information relating to regular E-Tests or Efficiency Tests of employees which can lead to discipline or support a pattern of conduct that the Company has previously relied on before this arbitrator. The information in E-Tests is recorded and to be placed on file at the time. I find the information submitted by the Company that was taken at the time should be given more weight than evidence gathered years after the fact.

39. I take notice from previous disputes that CP officers regularly observe employees as they go about their duties by performing E-testing. The Company maintains that in order to reduce human failure incidents and to improve compliance with safety rules, Company Officers engage in efficiency testing or the observing employees as they complete routine tasks to provide a measure of compliance and performance. An Efficiency Test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge.

40. The Grievor worked under the Honour System of pay. His previous discipline was in 2008 when he was cautioned for not accepting a call. He gave evidence that his overtime was never questioned and his supervisors were aware of when he was working overtime and when he would leave. His unchallenged evidence was that he contacted Honour System Audit Specialists twice to correct mistakes he had made in his claims and no audit was triggered. In that regard, I also find that there is no indication of any similar concern prior to this matter with his honesty of accountability since he hired with CP in 1994.

41. The Company submitted that the Grievor never approached Company Officers to approve his overtime. While there was no documenting of the changes in the Plan, evidence showed that on July 30, 2018, Mr. Bugg performed an E-Test on the Grievor recording that:

> While driving through F Yard I stopped Shawn and had him open the Kobota door. Shawn was operating the machine with his seatbelt done up.

42. Clearly during Mr. Bugg's supervision of the Grievor he had transitioned to full driving ability which was utilized and coincided with increased overtime claims. He had agreed to review the Plan but failed to change it and have the Grievor agree. Equally important is that he left the Company with no documentation to indicate that changes he had clearly agreed to implement. The Grievor claimed that any related changes to his work hours in the days of the week would be changed under the direction of a supervisor.

43. Prior to the July 30, 2018 E-Test performed by Mr. Bugg, Mr. Dwayne Westgard had performed three E-Tests on the Greivor. All were to confirm he was wearing proper protective

equipment. During the first day of the Investigation, Mr. Westgard was initially questioned by the Grievor's Union Representative regarding his taking over from Mr. Bugg and his memo of June 9, 2020. In responses he stated:

> He never discussed Mr. Arnolds accommodated position and responsibilities with Mr. Bugg.
> He didn't know the Grievor was submitting overtime.
> He never inquired if he was on overtime.
> He didn't look into the overtime because he was not approving the overtime.
> To the best of his knowledge the Grievor was not under his departments budget.
> He was aware that other supervisors asked Mr. Arnold to stay for overtime.
> When he worked the floor Mr. Arnold would tell him that he was leaving for the night.
> He never noted the time when the Grievor was leaving.
> He confirmed Mr. Arnold needed permission to take a Company vehicle to Regina.

44. At the conclusion of Mr. Westgard's evidence, the Investigating Officer asked:

> Q60 Mr. Westgard do you stand behind the information contained within your memorandum?
> A Yes I do.

45. The Investigating Officer noted at the conclusion of Mr. Westgard's evidence that:

> As stated in Mr. Westgards memorandum he was aware of 10-12 occurrences in which Mr. Arnold would have incurred overtime. Mr.Arnold never advised his direct supervisor of any other overtime claims being submitted. Mr. Westgaurd stood in place of Mr. Bugg for only a month prior to Sam O'Rielly's arrival.

46. On June 9, 2020, Mr. Westgard wrote the first of two memorandums to file regarding the Grievors overtime claims. He stated that the Grievor had never been required to work or forced to work overtime. His original memo which is the earliest dated document raising concern was clear in stating that the Grievor was never required to work overtime. I find that statement inconsistent with his E-Test of the Grievor on Sunday, April 1, 2018 when the Grievor would have been on overtime. It is difficult to understand his statement that the Grievor was never requested or required to work overtime when he was supervising and testing the Grievor on a Sunday overtime shift. The E-Test was one of five he performed on the Grievor. On October 7, 2019, he also performed an E-Test while going for what he described as a "ride with the Grievor to pick up tires."

47. Mr. Westgard minimized his understanding of the Gievor's work by stating that he only replaced Mr. Bugg for a month. However, his E-Test documentation filed by him showed he had been performing E-Tests on the Grievor for over two years. He was also required to give evidence twice during the investigation which began on July 7, 2020 and later July 11, 2020 in the Investigation which concluded on September 8, 2020. In his memorandum to file, he was clear that the Grievor was never required to work overtime and he can remember 10-12 occurrences that could have generated or warranted an overtime claim by Mr. Arnold. In his July 11 responses, he was less clear on facts indicating that his July 7 answer of 10-12 occurrences was approximate and

there could have been more. I cannot find his evidence credible given his clearly documented observations set out in E-Tests at the time they occurred and going back two years.

48. Following Mr. Westgard's evidence, the Grievor produced documentation in support of his overtime claims resulting in the following:

> Q68 Mr. Arnold can you explain why you have entered more than 140 folders of documents containing l00's of paper and why did you not feel that these documents were prudent to this investigation prior to now?
>
> A Upon receiving my package stating I would be under investigation for 4 years with no specific dates mentioned. I tried to get as much Information per day of those four years in preparation for questions I did not know were going to be asked during the investigation. When you asked if I had anymore letters I then Introduced them into this investigation.
>
> Q69 Mr. Arnold you have produced over 50 screen shots from text messages into this investigation. What relevance does this have?
>
> A They were during the course of doing business for the company. They were in performing tasks for the company with supervisors and employees and contractors
>
> Q70 Mr. Arnold how **can you prove that you were at work** during the times you were sending or receiving these text messages?
>
> A Well some that I submitted were from off duty hours and the weekend from the supervisors initiated. If you give me a date or time I can clarify. **Emphasis Added**

49. In contrast, Company Officers repeatedly responded to questions in the investigation stating they could not remember or recall. The investigation began on July 7, 2020. On July 10, 2020, Supervisor Chad Woodrow gave evidence at the Grievor's investigation. At the outset of his evidence, he could not remember working with the Grievor just two months earlier on May 13. Later he would say he remembered the Grievor hanging around the shop on May 13. He assumed when he was hanging around, he was not charging overtime. I note that hanging around and assumptions of not charging overtime would later be put to other witnesses as questions by the investigating officer.

50. Mr. Woodrow also performed five E-Tests on the Grievor all with passing grades but made no mention of them during the investigation. I also note that Mr. Woodrow's comments of the Grievor just hanging around the shop are not reflected in his E-Test favourable and repeated comments. It served to undermine and weaken the reliability the evidence he provided as fact to the investigating officer.

51. Mr. Samuel O'Reilly replaced Mr. Bugg on November 19, 2019. He provided the second memorandum to file that was in the initial evidence to begin the investigating. He also suggested that when the Grievor working or driving to pick up or drop off an injured accommodated co-worker he was doing so on his own time. He was asked:

> Q169 Mr. O'Reilly have you ever seen Mr. Arnold hanging around the Car shop after 1500 talking to the guys or involved in afternoon safety briefings?

A Yes

Q170 Mr. O'Reilly, Mr. Arnold has stated in this investigation that you and Dwayne Westgard had tasked him with the responsibility to pick up Denis Maydanich for 0800 and take him home for 1600. Was this task given to Mr. Arnold by yourself or Mr. Westgard?

A No he was never assigned that task by either of us. The original plan I made with Denis Maydanich was that I would be picking him up every morning because I wanted to accommodate him at work to have him help educate the junior carmen.

Q171 Mr. O'Reilly can you explain why Mr. Arnold would have been picking up and dropping off Mr. Maydanich?

A He did it on his own accord.

52. I recognize that railway investigations are not intended to be conducted as a court of law. They are to establish the facts fairly and honestly. It is also recognized that the party who calls a witness is generally not permitted to ask the witness leading questions. I find that asking a new manager if he had seen the Grievor hanging around was leading. It would be followed with a question and answer that the Grievor was on his own time. It is against the backdrop of Mr. O'Reilly's recent appointment after Mr. Bugg's exit from the Company that he was questioned. Given the leading questions, revising his answers and observations regarding the Grievor's hours of work and not being aware of contradictory Supervisor E-Test reports that I find his evidence not reliable.

53. The Grievor was given a workplace accommodation in accordance with a Return To Work Plan dated February 23, 2016. The plan specified that it was to be reviewed in March of 2016. It was not. The Supervisor, Mr. Bugg who agreed to the plan exited the Company in 2019 without changing the Plan to reflect changes made in 2017 while he was actively supervising the Grievor. Evidence established that the Grievor's medical restriction regarding driving were eased in late 2017. Mr. Bugg performed an E-Test or Efficiency Test on July 30, 2018, while the Grievor was driving, yet did not revise the Plan or document changes. In this case, I find the delay was inordinate and prejudicial to the Grievor. It may well have been avoidable had Mr. Bugg made appropriate changes to the RTW Plan specifying hours of work and overtime conditions.

54. Throughout the investigation, the Grievor's Union representative had objected to many questions put to witnesses on the basis of fairness to the Grievor, based on the questions being asked by the investigation officer or not allowed by him when put to witness by his Union Representative.

55. At the time of his expanded driving duties, the Grievor was given an E-Test on November 27, 2017 by Joshua Derraugh. It was a failed E-Test for driving too fast at 14:57 as he was approaching overtime after picking up rims. Among the more than 25 E-Tests, Officer Devon Cole also reported a Pass on the Grievor performing his duties in the shop on February 8, 2019, an indication that other supervisors knew and understood he had duties in the shop in contrast to just hanging around when he was off duty.

56. Alleging theft of time without credible evidence in support of same could be particularly damaging to the Grievor's reputation with his co-workers. The Union submits that after four days of investigation on July 7, July 9, July 10, and July 11, CP undertook at this juncture to gather

statements from 22 car shop employees. It is the Union's view that these Moose Jaw employees' statements strengthen the Union's position in this matter. The Union argues the multiple eyewitnesses corroborated that Mr. Arnold was a very hard and dedicated employee who worked overtime regularly as per the tasks assigned to him by the supervisors. I have reviewed the statements of the 22 bargaining unit employees. I find they are overwhelmingly contradictory to those submitted at the investigation by Company supervisors.

57. The Company chose to rely solely on the Grievor's investigation statement. It did not consider his discipline record containing its own E-Test reports or the investigation statements of the 22 shop employees. I find that in doing so it served to undermine and weaken the value of much of their evidence.

58. The Union also objected to General Manager, John Bell, as the investigator in this case due to the Grievor recently being moved under his budget. I find as General Manager, he had reason to be concerned given the three initial documents he was provided regarding overtime claims. I do not find that the discipline assessed constituted further discrimination based on disability as inferred by documents placed in the Union's submissions. I find he was investigating based on unreliable and uncredible information initially provided to him. In addition, he did not appear to have been provided the Grievor's full discipline file which included the E-Test reports.

59. The Union objected to both the notice of investigation and the reasons for dismissal set out in the decision from the Company. In that regard, on June 30, 2020 the Grievor was advised that he was required to attend an investigation on July 2, 2020 in connection with:

> wage claims between February 23rd, 2016 and May 15th, 2020

60. The Grievor was dismissed by letter on September 22, 2020 stating:

> You are hereby dismissed due to your inappropriate wage claims under the Honour System as determined by the Formal investigation into your wage claims between 2016 and 2010.

61. Time theft in the employment context is viewed as a very serious form of misconduct particularly when paid initially without question under the Honour System. I agree with the Company that a Grievor does not escape discipline simply because, the Company was not able to prove the full range of its allegations. Whether one hour or one day, dismissal after an investigation examining claims over a reasonable period of time, may be just and reasonable. However, the dismissal in this case was not grounded on proof for any specific date or dates. The investigation was initially trigger by Mr. Westgard's evidence which I find was not credible.

62. I have considered the Union's primary position of undue delay. After considering the impact of the undue delay of up to four years on the veracity of the evidence, I am satisfied that on that basis alone the grievance should be upheld.

63. I find that the Company gave no meaningful consideration to the possibility that delay was impacting the quality of the evidence. It gave no explanation for not considering that any prejudicial effects were evident. The evidence of the Grievor that he had contacted the Honour Sytem auditors was not challenged or investigated. There is no evidence that an investigation by Honour System auditors was ever conducted or considered. Mr. Scott Watkins of Honour System Audit provided basic overtime information following the request from Mr. Bell after Mr. Westgard's Memorandum.

64. It is not my role to substitute my view of motives for triggering an investigation based on

unreliable or uncredible evidence as speculated by the Union in this case. That said, Mr. Bugg's absence as a key witness and his failure to document any changes was a significant factor of undue delay. He clearly failed to review his RTW Plan as required. Mr. Bugg was a key witness who had left the Company. He left no documentation to address the changes he made to the plan. Clearly memories had faded for many of the witnesses. Witnesses responded that they could not recall key facts they had recorded in E-Tests. Questions were put to witnesses during the investigation often without indicating the year and clarification had to be given.

65. Mr. Westgard's memo prior to the investigation and his evidence at the investigation was not credible. His original memo was clear that the Grievor was never required to work overtime yet he reported supervising the Grievor on a Sunday in Mr. Arnold's discipline file. He changed his evidence during the investigation. He did not recall facts he had recorded in Company records.

66. No records were produced at the investigation which established any intent by the Grievor to steal. Bargaining unit employee statements that challenged Mr. Westgard's evidence were not considered. Clearly, I found the E-Tests records of supervisors were relevant in these circumstances as they impacted consideration of prejudice from undue delay.

67. In view of all of the foregoing, I find the failure to recognize undue delay negatively impacted the Grievor's right to a fair and impartial investigation. For the reasons I have set out in this award, the evidence did not establish culpability. The evidence necessary or given to the Investigating Officer against the Grievor was at times unavailable, largely unreliable and in some cases not credible.

68. The Grievor's dismissal is therefore void ab initio.

69. I would add in obiter that it is not clear if the tests or discipline record were provided to the Investigating Officer John Bell or Scott McGraw, who assessed the discipline September 23, 2020. It is clear they were not cross referenced to allegations against the Grievor. The Union filed detailed grievance letters addressed to Mr. McGraw and Mr. Bell at Step 1 and 2 of the grievance process. Neither officer responded to the letters or gave evidence at the arbitration hearing. I recognize the legitimate concern first brought to the attention of the Company by Mr. Westgard's memo to file. That said, the Grievance process provides an opportunity for a fresh review on two occasions that were not utilized.

70. The Grievor will be reinstated without loss of seniority or benefits and with compensation of all wages in accordance with his original RTW Plan. The RTW Plan will be reviewed and updated accordingly within 30 days of this award.

71. The arbitrator retains jurisdiction with respect to the interpretation, application, and implementation of this award.

Dated this 16th, day of January, 2023.

Tom Hodges
Arbitrator