IN THE MATTER OF AN ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(The Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(The Company)

DISPUTE

Appeal of the 20 Demerits assessed to Conductor Dustin Playfair of Kenora, ON.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Playfair was assessed 20 Demerits described as "For not following the work order provided causing delayed trains and customer failures while working as a conductor on train 420-11 out of Kenora, Ontario on April 11th 2020, a violation of T&E Safety Rule Book Safe Work Procedure: Job Briefings, T&E Safety Rule Book T-0 Job Briefings, CP Rule Book for Train and Engine Employees Section 2.2 While on Duty item (a), (v) and (vi), CROR General Rule A (vi) and (viii)."

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

UNION POSITION

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement based on:

The allegation that the subject matter of the notice of investigation predetermined culpability prior to the investigation being conducted.

The Union contends the Company has failed to establish culpability of a violation of T-0 Job Briefing based on Q&A 20 and 21, nor Item 2.2 (a), (v) or (vi) or CROR General Rule A (vi) or (viii) as they are generic rules. The Company has failed to meet the burden of proof that not following the work order caused delayed trains and customer failures.

The Union contends the discipline assessed is unjustified, unwarranted, and excessive in all of the circumstances, including the following mitigating factors:

Mr. Playfair's acknowledgement of the event occurred as the record indicates, and Q&A 31 and 32.

It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Playfair is made whole for all associated loss 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 objects to the Union's allegation that the Grievor was not afforded a fair or impartial investigation. Both the Grievor and the Union were provided with the ability to state any procedural concerns during the investigation statement and failed to do so. The Company maintains the Union's attempt to bring forth an argument for an alleged unfair and/or impartial investigation only after the investigation was completed and during the grievance process prejudices the Company.

Notwithstanding the aforementioned, the Company maintains that after a fair and impartial investigation was conducted, culpability was established and the quantum of discipline was appropriate, given the circumstances and the Grievor's disciplinary history. The assessment of 20 demerits for not following the work order provided, causing delayed trains and customer failures while working his assignment on April 11, 2020 was in no way excessive.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole".

Accordingly, the Company maintains no violation of the Collective Agreement has occurred and seeks that the discipline assessed should not be disturbed.

FOR THE UNION:

D Fulton

Dave Fulton
General Chairman
TCRC CTY West

FOR THE COMPANY:

Lauren McGinley
Assistant Director, Labour Relations
Canadian Pacific Railway

February 6, 2023

Hearing: By videoconference February 22, 2023

APPEARANCES
FOR THE UNION:
Ken Stuebing, Counsel, Caley Wray
Dave Fulton, GC CTY West
Jason Hnatiuk, Senior Vice General Chairman
Doug Edward, VGC CTY West
John Rousseau, LC Kenora
Dustin Playfair, Grievor

FOR THE COMPANY:
Diana Zurbicon, Manager Labour Relations
Sharney Oliver, Labour Relations Officer
Jillian Penner, Trainmaster – Kenora, Ontario

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] The Grievor, Dustin Playfair, is 30 years of age. Mr. Playfair hired on with the Company on January 23, 2012. He worked as a Conductor out of Kenora, Ontario since that time.

[3] On April 11, 2020, Mr. Playfair was working in unassigned service in the Ignace Subdivision pool out of the Kenora Terminal. The Grievor was working as Conductor on train 420-11 ordered for 03:00 out of Kenora, ON.

[4] On April 18, 2020 the Grievor received a notice of investigation to be held on April 22, 2020 in connection with:

> The events that took place on your tour of Duty as a conductor on the 420-11 out of Kenora, ON, on April 11th, 2020 that resulted in delaying a train and failing service on a customer.

[5] An investigation was held on April 22, 2020 into incidents which occurred on train 420-11 after which he was assessed with 20 demerits on May 6, 2020.

COMPANY SUBMISSIONS

[6] The Company maintains that the investigation established he failed to follow his work order on two occasions, which caused unnecessary delays to trains and in customers receiving their

shipment of goods. The first incident was when he lifted 11 cars at Vermillion Bay to go West, when the work order clearly directed that the 11th car needed to go East. The second incident occurred later that morning at the Domtar mill tracks in Dryden West when the Grievor left a car behind that was supposed to be lifted from Domtar.

[7] During the investigation the Company maintains it confirmed the following facts:

a) The Grievor's inattentiveness to his duties during his work shift resulted in lifting the wrong number of cars on two occasions that day.
b) The Grievor confirmed that he failed to validate the required lifts and set offs with his paperwork when he stopped at the customer tracks.
c) The Grievor knew and understood the rules required of him and the consequences if not adhered to.
d) When asked why this occurred, he flippantly stated that he must have just forgot.
e) The Grievor affirmed he was afforded a fair and impartial investigation.

[8] CP argues that the discipline assessed was warranted and consistent with progressive discipline. It submitted that the Grievor's discipline history up to the point of this incident is as follows:

Date	**Discipline Assessed**	**Comments**
May 6, 2020	20 Demerits	Not following work order provided, causing delayed trains and customer failures while working as Conductor on Train 420-11 out of Kenora on April 11, 2020.
April 27, 2020	15 Demerits	Excessively booking unfit for 36 hours and 45 mins on April 9, 2020.
October 9, 2019	Formal Reprimand – Admission of Responsibility	Violation of the T&E Availability Standard (attendance issue).
March 5, 2018	10 Demerits	Missed call on February 10, 2018.
May 14, 2017	5 Day Deferred Suspension	Two missed calls on May 14 and 15, 2017.
December 7, 2015	14 Day Suspension	Derailing the 2 tail end cars of his movement while shoving his train into the North Stage Track at Molson, MB without protecting the point of his movement.
April 16, 2015	Written Warning	Booking unfit on March 14 and missing calls on 3 separate occasions.
October 31, 2014	Written Warning	Booking Unfit on 5 separate occasions when called.
July 11, 2014	3 Day Suspension	Failing to provide manual protection at a crossing at mile 144.39 Ignace Sub on June 15, 2014.

November 21, 2012	20 Demerits	Attendance Management Policy violation between August 14 – October 26, 2012.
August 14, 2012	10 Demerits	Attendance Management Policy violation in June, July, August 2012 and missed call on August 11, 2012.

[9] The Company acknowledged the Grievor as being honest and forthwith throughout the investigation. However, CP maintains that lack of intention to violate the rules does not negate culpability in this matter. The Grievor's actions were noncompliant with the rules outlined in his form 104 for his failure to follow the work order provided, causing train delays and customer failures on April 11, 2020. He confirmed that he accepted his call without being properly fit and rested for duty. He also confirmed that he did in fact fail to follow his work orders when he lifted an extra car at Vermillion Bay and then did the opposite at Dryden.

[10] The Company maintains that cause was clearly established to assess discipline after the fair and impartial investigation into the matter and that the assessment of 20 demerits was an appropriate outcome given culpability was established and in consideration of his disciplinary standing.

[11] The Company submits that a Conductor's core duties include following the work orders that are provided to train crews during their tour of duty. It says a work order is essentially a set of instructions to the switching/train crew used for making industrial switching and building trains in a specific order as required to fulfill customer orders and requirements. CP says the Grievor had 10 assessments of discipline in 8 years. On average, the Grievor did not go one year discipline free over the course of his service with the Company.

UNION SUBMISSIONS

[12] The Union submits that the facts leading up to the incident are significant. It argues that on April 8, 2020, Mr. Playfair had booked unfit on call. He was then placed on Q status indicating that he could not book on without supervisor approval, as per direction from Trainmaster Jillian Penner. Without any notice whatsoever, he was booked back "available" at 0001 Eastern (2301 local time) on April 11, 2020. He was then surprised to receive a call for duty at 0130 for Train 420-11, ordered for 0330 on April 11.

[13] During his statement Mr. Playfair stated that he accepted the call and reported for duty, although he did not feel fully rested. He stated that accepted the call as he was fearful—based on previous experience—that he would be held out and potentially subject to discipline if he booked unfit again on April 11.

[14] While working Train 420-11 at Vermilion Bay, the Union says the crew lifted an additional car in error. While performing work at Dryden, it says Mr. Playfair was being assisted by Assistant Trainmaster (ATM) Steven Briggs. Mr. Playfair advised Mr. Briggs of the additional car lifted at Vermilion Bay. As a result management arranged for the car to be set off at Ignace by the outbound Thunder Bay crew. The Thunder Bay crew was the crew that traded off with Mr. Playfair, taking the train east. The car was set off by this crew at the crew change point Ignace to be taken west later by a third crew.

[15] The Union submits that while working at Dryden, under the direct guidance and assistance of ATM Briggs, Mr. Playfair lifted 15 cars. In so doing, he inadvertently left behind a 16th car

which was to be lifted as per his work order. At approximately 1200 hours, Mr. Playfair realized this oversight while coupling back to his train. The Grievor promptly advised ATM Briggs of the missing car. Management made the decision not to send the crew back to get the missing car due to concern with the crew's hours of service.

[16] The Union submits that at no time on April 11, 2020 did the Grievor breach any operating rules, whether CROR or T&E rules. On both instances, he was specifically instructed by ATM Briggs to proceed, rather than correct either situation. He was subsequently summoned for an investigation on April 22, 2020 in connection with:

> The events that took place on your tour of Duty as a conductor on the 420-11 out of Kenora, ON, on April 11th 2020 that resulted in delaying a train and failing service on a customer.

[17] The Union argues that despite this pre-determined subject matter of investigation, there was no specific evidence put forth whatsoever of alleged delay to a train nor of "failing service."

[18] In the context of the COVID-19 pandemic, the Union submits that Mr. Playfair's Local Chairman Mr. Wallace sought to have the in-person investigation delayed in the innocuous circumstances, which could well have been addressed informally. The Company disagreed. At the outset of the statement, Local Chairman Wallace advanced a series of proper objections to the process employed by the Company, including a pointed objection, "to the investigation in its entirety as it could have been handled informally. We are in the middle of a worldwide pandemic. The Union argues that CP did not want to defer this statement to another time, therefore placing people in a position that they cannot properly social distance.

[19] The Union submits that the Company is unable to establish cause for a penalty of 20 demerits which it says is 1/3 of a dismissal under the Brown system, as assessed in the Form 104. The Company must meet its burden of proof in this regard, of establishing that the Grievor was culpable of misconduct causing delayed trains and customer failures.

[20] The Union submits that assessment of 20 demerits is unjustified in all of the circumstances. There is no cogent evidence of misconduct whatsoever in these circumstances. There is no evidence of intentional delay, significant incident or safety risks in these circumstances.

[21] With respect to the Rules set forth in the Rule 104, the Union submits that the Company can fairly be accused of "piling on" the Grievor. In CROA Case. No. 4492, Mr. Sims stated:

> The Union urges that, in respect to both the sleeping allegations and the speeding allegations, the Company has "thrown the book" at the grievor using every possible rule violation that might be claimed over the alleged conduct. I accept the proposition that an arbitrator should look at the individual allegations as a whole and not treat each possible rule violation as a separate failure.

[22] In CROA Case No. 4622 Mr. Sims provided an analysis of the piling on and disregarded the Section 2 allegations in their entirety stating:

> Notably, the grievor was not terminated for a direct breach of Rule 112. The Union validly objects that most of the Section 2 charges are overreaching or "piling on". The real allegations are of an inadequate job briefing (Section 2.2(c)(xii)) and a failure to properly test the hand brake once applied. The other Section 2 charges could not be established without particulars, and the

> only particulars of any substance are these two matters. They add nothing, and would not, even if upheld, affect an appropriate penalty. The Union urges the Arbitrator to apply the same principles in the present case. The Company's Form 104 contains many alleged violations that are simply not borne out on the evidence. In particular, the Union notes that the Form 104 alleges breach of Job Briefings. As noted, it is uncontradicted that a job briefing was performed as required. Any question as to the sufficiency of the job briefing is undermined by not calling evidence from the Locomotive Engineer.

ANALYSIS AND DECISION

[23] I find that there is no dispute between the parties that these incidents occurred. I do not find the circumstances innocuous as argued by the Union. Clearly, not performing work as set out in a Job Briefing can and did result in a situation harmful to the Company and its customers. The Grievor acknowledged the fact in his statement.

[24] I also find the investigation statement clearly established that the Grievor's inattentiveness to his duties resulted in lifting or failing to lift cars on two occasions that day. He confirmed that he failed to validate the required lifts and set offs with his paperwork when he stopped at the customer tracks. Further, he confirmed that he knew and understood what was required of him and the consequences of the delays occurred with the involvement of other trains in correcting his errors.

[25] When asked the about the errors he provided a number of answers that he may also have found them innocuous responding with answers:

> Oh yeah I lifted an extra car at vbay that had to be set off in Ingnace but Thunder Bay crew did the work.We lifted 15 and we were suppose to lift 16 because I forgot one car.

[26] About the impact of the errors he responded:

> People don't get service and a train would be delay to set off the car to go west and delay another train to pick it up.

[27] I find that he clearly understood what he was responsible for and should have done when he flippantly answered:

> I don't know counted the cars, double checked with my work order.

[28] When asked if he had anything he wished to add to his statement he first stated.

> I think we pretty much covered everything.

[29] Only when the question was put to him again did he respond – No.

[30] The Union relies on Arbitrator Clarke's ratio decidendi in CROA Case No. 4524, which involved, inter alia, a 30 day suspension for delay in assignment. Mr. Clarke upheld the grievance in full and spoke to the threshold that the Company must meet to justify such a severe penalty when alleging culpable, non-productive work:

> While a debate may exist whether Mr. Playfair could have followed another method which would have avoided delay, that is a considerably different allegation from one alleging a specific intent to delay a train. The evidence shows that Mr. Playfair adhered to various requirements when carrying out

> his multiple duties. CP did not demonstrate that Mr. Playfair was simply doing unproductive work when performing these duties.

[31] The 30 day suspension was one of five grievances addressed by Arbitrator Clark's January 26, 2017 decision as follows:

> October 31, 2014 15 demerits – Written warning substituted for booking unfit at time call received
> April 16, 2015 30-day suspension – Written warning substituted for missing calls
> December 7, 2015 30-day suspension intentional delay - Overturned
> December 7, 2015 Discharge - Derail – 2-week suspension substituted
> December 7, 2015 Discharge – Bond of Trust- urine test - Overturned

[32] In overturning the 30 day suspension for intentional delay Arbitrator Clarke stated:

> CP did not satisfy the arbitrator that Mr. Playfair "intentionally" delayed his train when carrying out various duties. The facts in this case differ significantly from the types of situations where allegations are made that an employee intentionally sought to delay a train: CROA&DR 3952.
> While a debate may exist whether Mr. Playfair could have followed another method which would have avoided delay, that is a considerably different allegation from one alleging a specific intent to delay a train. The evidence shows that Mr. Playfair adhered to various requirements when carrying out his multiple duties. CP did not demonstrate that Mr. Playfair was simply doing unproductive work when performing these duties.

[33] In the case before me it is not about the Grievor's intention or lack thereof. I find that in this case it is about his inattention to the task being performed and failure to follow documented set off and lift instructions. The Company responded that CROA 4524 demonstrates the Grievor has a patterned history of not carrying out his duties diligently.

[34] I find that Arbitrator Clarke also addressed this Grievor's failure to follow proper procedures in CROA 4524 when he stated:

> On November 15, 2015, Mr. Playfair failed to protect the point during the setoff of 56 cars. This failure resulted in two cars derailing, since they could not all fit on the track. CP terminated Mr. Playfair on December 7, 2015 for this and other matters.
> The TCRC did not dispute the facts, but contested the severity of the penalty imposed.
> CP has satisfied the arbitrator that it had grounds to discipline Mr. Playfair for this rule violation which resulted in two cars derailing. CP has advised it does not wish to follow the Brown system any longer. Previous cases have suggested the appropriate types of penalties for this type of scenario. The parties in future cases will have to debate in detail appropriate penalties if the Brown system will not be followed so that consistent standards can be developed over time.
> In the current circumstances, considering Mr. Playfair's remorse and admission, the arbitrator substitutes a 2-week suspension for the termination

originally imposed. CP will reinstate Mr. Playfair, without loss of seniority or benefits, and compensate him for the period other than during the substituted suspension.

[35] Union submitted that the crew made the error in the case before me. I find the Grievor had the responsibility for ensuring that he lifted and set of the correct cars. He had the documentation and failed to follow its requirements. There is no evidence that the Locomotive Engineer knew of the errors. He was not requested by the Union to give evidence at the Grievor's investigation.

[36] The Union suggested the train could have gone back and corrected the error. As noted by ATM Briggs in his memo, that could have done more harm by impacting the 10 hour rest entitlement of the Grievor's crew.

[37] I do not regard this case as a "pile on" of rules by the Company. The 104 gives a clear and concise description of the rules violated as a result of the Grievor failing to follow his work orders. I agree with the Company that although they may seemingly be general rules in every day practice, they are paramount in ensuring a safe, efficient and effective railway operation. I find that the Grievor failed to adhere to the rules in this instance when he was careless in his work performance and sent a car to the wrong direction in one instance, and forgot another car later on the same day.

[38] The Company acknowledged that the Grievor took responsibility and apologized for his errors. However, during his statement the Grievor maintained he was not fully rested when he took the call for train 420-11 ordered for 03:00 on April 11, 2020 out of Kenora, ON.

[39] The Company work history document indicated the Grievor booked unfit on Thursday, April 9, 2020. At the time he was subject to call on the Ignace Subdivision unassigned pool out of the Kenora Terminal. On Saturday April 11, 2020 at 0001 he was booked on by Superintendent N. Patton without notice.

[40] Mr. Playfair stated he was then surprised to receive a call and not well rested for duty at 0130 for Train 420-11, ordered for 0330 on April 11. He said he accepted the call and reported for duty, although he did not feel fully rested. He stated that accepted the call as he was fearful—based on previous experience—that he would be held out and potentially subject to discipline if he booked unfit. He also stated that he was not full rested but was rested to the best of his abilities given the unsafe situation the Company had put me in by booking him on without him knowing it. I find his claim of being put in an unsafe situation unfounded.

[41] The Grievor claimed that based on past experience he had expected not to be allowed to book on 48 hours after booking unfit on April 8, 2020. When challenged by the investigating officer regarding the assumed 48 hours off he stated that he had no proof of his past experience but stated it was a common practice.

[42] I find his statements regarding his not being fully rested and the expectation of 48 hours off before he could book back on self-serving and lacking corroboration. I find at 0001 Saturday April 11 he had been off over 36 hours without trying to book back into his unassigned pool since booking unfit.

[43] The Grievor's discipline record indicates he is experienced with investigations, discharge, booking off and on as well as unfit for duty. He has not hesitated to do so in the past. I find no evidence to support his position of an accepted practice of 48 hour hold off duty of employees after booking unfit. I would add in obiter that in my opinion, truthfully booking unfit should not

result in discipline. Fitness for duty is fundamental to safety. That said, booking unfit should not be regarded as an accepted practice for securing 48 hours off from unassigned service.

[44] Given the Grievor's previous discipline record, I find the 20 demerits appropriate in these circumstances.

[45] In view of all of the forgoing the grievance is dismissed.

Dated at Niagara-on-the Lake, this 8th day of May 2023.

Tom Hodges
Arbitrator