IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and -

CANADIAN PACIFIC KANSAS CITY RAILWAY

(the "Company")

DISPUTE:

Appeal of the 30 Demerits and subsequent dismissal of Conductor William Ryan of Vancouver, BC.

JOINT STATEMENT OF ISSUE

Following a formal investigation, Mr. Ryan assessed 30 Demerits "For failing to be available for duty when properly called for the V84-29 assignment at Mile 111.9 Cascade Subdivision on April 29, 2021 resulting in a miss call. A violation of the T&E Availability Standards Canada." Mr. Ryan was subsequently dismissed "For an accumulation of demerits under the Hybrid Discipline Policy dated November 1, 2018."

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

UNION POSITION

The Union contends the discipline assessed is grossly excessive in all the circumstances, and that the Company is piling on discipline to justify the dismissal of Mr. Ryan.

The Union contends the Company has failed to consider mitigating factors of long hours worked and fatigue contributing to sleeping through his call for work.

The Union submits that Mr. Ryan was wrongfully held from service in connection with this matter, contrary to Article 39.06 of the Collective Agreement.

With respect to the Company's objections regarding:

- the bundling of disputes,

- the alleged vagueness of the Union's request that the grievor be made whole, the Union's position remains unchanged. The Union further considers this matter to be res judicata.

The Union requests that the discipline be removed in its entirety, and that Mr. Ryan be reinstated without loss of seniority and benefits and be 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 maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation.

Regarding the Union's closing allegation that the discipline was unjustified, and unwarranted. The Company cannot agree with this allegation. Moreover, the Union supplied insufficient information in support of this allegation. It is not sufficient for the Union to simply state its position without supplying rationale, details or frankly any support for the allegations.

The Grievance handling procedure requires sufficient information to be included in the grievance to be able to properly identify the issue and basis for an allegation. The lack of pertinent information renders the Company unable to properly respond. The Company reserves the right to object should the Union attempt to supply any additional arguments in support of this unsubstantiated allegation.

Culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that Union describe. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:

For

_____

Dave Fulton
General Chairperson
TCRC CTY West

FOR THE COMPANY:

_____

Chris Clark
Manager Labour Relations
CPKC Railway

May 1, 2023

Hearing: By video conference. May 11, 2023

APPEARING FOR THE UNION:

Ken Stuebing CaleyWray – Counsel
Jason Hnatiuk TCRC – Vice General Chairman CTY West
Doug Edward TCRC – Sr. Vice General Chairman CTY West
Brad Wiszniak TCRC – Vice General Chairman CTY West
Jeremy Quick TCRC – Local Chairman CT Division 320
William Ryan – Grievor – Regina, SK

APPEARING FOR THE COMPANY:

Chris Clark, Manager Labour Relations
Diana Zurbuchen, Manager Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant 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. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] The Grievor is a short service employee, having entered Company service on September 10, 2018 and was working as a Conductor based out of the home terminal of Port Coquitlam at the time of his dismissal.

[3] On April 29, 2021, Mr. Ryan was working assigned to the Conductor position on the V84 Road switcher starting in Port Coquitlam at 14:00. IN CMA, Mr. Ryan requested a call for his assignment. At 12:01, the CMA attempted calling Mr. Ryan for his assignment using the VRU. Mr. Ryan was assessed a Missed Call for work at 12:15.

[4] The Grievor provided the following reasons for missing the call as follows:

> Worked 10 hours the previous multiple days and woke up prior to the original assignment call time at 10:00, waited 15 minutes for a call and after not receiving one, I went back to sleep and did not hear my ring tone which is the same as my alarm which I woke up previously to and for some reason I did not wake up for the call.

POSITIONS OF THE PARTIES

[5] There is no dispute that the Grievor was subject to a call on the date in question. The parties have given significantly different interpretations of the Grievor's previous days of work and rest prior to the missed call.

[6] The Company submits that the Grievor admitted to knowing and understanding that regular attendance at work is the responsibility of each employee. The Grievor further confirmed knowing and understanding:

- The Company's T&E Availability Standard;
- Terminal Manpower is critical to meeting customer service requirements;
- Canadian Pacific is a 24/7 operation that requires employees to be mentally prepared and properly rested to perform their duties

[7] The Company maintains that the Grievor offered no meaningful reason for missing his call other than not hearing his phone ring. It is also important to consider that this wasn't the case of the Grievor falling back to sleep and miss taking a call only minutes later. According to the Grievor, two hours later, when the Company made their 2nd attempt, he claims he was still asleep. The Company maintains that on the balance of probabilities he never intended to go to work that day. Notwithstanding being off rest and available for work.

[8] The Company can see no mitigating factors which should have prevented it from assessing discipline for the Grievor's actions. The Company maintains that it is highly inconceivable that fatigue induced by his work schedule played a role in the Grievor's missed call. Even if it had, it still would not negate the fact the Grievor failed to take his call and fulfill his employment contract. The Company can see no mitigating factors which should have prevented the Company from assessing discipline for the Grievor's actions. The Company is equally perplexed at the Union's assertion that the Company violated Article 39.06 of the Collective Agreement.

[9] The Union submits that it is well-established that the mere absence from actual work assignments does not, in and by itself, rise to the level of culpable behavior and subsequently attract discipline. Mr. Ryan explained that he missed a call on April 29 because he had worked some long hours prior to this occasion. Indeed, Mr. Ryan's work history shows that he worked 30 hours and 10 minutes in the 3 days prior to the missed call, and 10 hours and 25 minutes the day prior.

[10] The Union submits that the circumstances of the April 29 missed call is not deserving of any discipline, let alone the assessment of 30 demerits and dismissal assessed in these circumstances. This penalty cannot be said to serve the legitimate corrective or educative value of discipline in these circumstances. The Company has not posited or tendered any evidence to explain why the circumstances of the April 29, 2021, missed call are so uniquely severe as to justify substantial discipline. There is no evidence of delay of assignment or any other specific prejudice or harm that elevates that matter to justify this very significant penalty.

[11] The Union submits that in CROA Case No. 3190, a thirty-five-demerit penalty for two (2) missed calls resulted in the employee's dismissal, and where the Arbitrator substituted a 10 demerit penalty with full redress to the Grievor.

[12] The Union relies upon CROA Case No. 3639 involving an employee who had an extensive history of absenteeism. In spite of his record, Arbitrator Picher substituted a 7-day suspension with a 3-day suspension for two missed calls. The arbitrator stated:

> In the case at hand it does appear that certain of the discipline assessed against Ms. Skinner was, at least in part, for her failure to attend at work by reason of illness. The seven day suspension assessed against Ms. Skinner on June 29, 2005 involves both culpable and non-culpable conduct. It appears that in a four month period the grievor was absent from work by reason of illness on three occasions and that she also missed two calls over the same period. As the grievor had already been assessed a deferred suspension for missing calls for duty on May 20, 2004, the Arbitrator is satisfied that some suspension would have been appropriate in light of the recidivism as to missed calls reflected in the period of March 15 to June 6, 2005. It was not, however, appropriate to attribute any part of a suspension for her failure to be at work by reason of illness on the three days recorded in that four month period. In the result, I am satisfied that a three day suspension would have been sufficient in the circumstances which were then under review, and that that discipline should be adjusted accordingly. For the purposes of clarity, the three day suspension shall be only for missed calls, and no discipline can be attributed to the grievor's absence due to illness not challenged by the Company.

[13] The Union maintains that when 3 missed calls warrant only a Written Warning, the fairness and reasonableness of 30 demerits and dismissal in the circumstances cannot be sustained on any principled basis. For all of the foregoing reasons, the Union respectively submits that the assessment of demerits to Mr. Ryan for his single missed call is excessive by any measure. The Union contends that the discipline assessed to Mr. Ryan is excessive and unwarranted in respect of his isolated missed call on April 29, 2021. This penalty should be reduced to such a quantum that serves the corrective, educative purpose of the Brown system of discipline.

[14] The Union maintains that this case is not close to justifying the outright dismissal assessed to Mr. Ryan. Article 39.06 provides that an employee will not be held off (out of service) unless the nature of the offence is of itself a dismissible offence. The Company may only withhold an employee from service in the face of a dismissible offence. This language provides as follows:

> An employee is not held off unnecessarily in connection with an investigation **unless the nature of the alleged offence is <u>of itself</u> such that it places doubt on the continued employment of the individual or to expedite the investigation**, where this is necessary to ensure the availability of all relevant witnesses to an incident to participate in all the statements during an investigation which could have a bearing on their responsibility. Layover time will be used as for as practicable. An employee who is found blameless will be reimbursed for time lost in accordance with Clause 30.01(1), (2), (4) or Clause 49.01(1), (2), (4).
>
> **<u>Emphasis added</u>**

[15] I find that the Grievor was a short service employee in a new terminal with a significant discipline record. His performance gave managers concern for his adherence to the rules. Although, as I have set out in other decisions, much of that attention was in the form of memos and investigations. Coaching and informing the Grievor may well have served the Grievor better.

[16] I agree with the Company's reliance on the Wm. Scott principles adopted and reviewed in U.S.W., Local 3257 and Steel Equipment Co. Ltd. (1964). The Grievor knew or ought to have known his job was in jeopardy. CPKC is a 24/7 operation and the related Company rules and expectations were known to the Grievor. However, I find that he may have misunderstood the work and availability rules and expectations for which the Company takes seriously. As the Grievor was moving between different terminals and provinces I cannot find that he received the individual coaching or instruction to meet those requirements.

[17] The Company also points to Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586 (ON LRB) in which Arbitrator Gee of the Ontario Labour Relations Board states:

> …..the question arbitrators should ask themselves, when considering penalty substitution, is whether the penalty imposed by the employer is within the range of reason having regard to all the circumstances of the case.

[18] The Grievor entered Company service on September 10, 2018. He had previous discipline for an attendance issue in August 2019. After four disciplinary incidents for rule violations, which I have also addressed, he was warned that his job was in jeopardy in March of 2021. I find that he was not showing an increased attention to rules which he knew or ought to have known were being strictly enforced. Knowing these facts he did not ensure his availability for a call he received after 10 AM. He says he fell back to sleep and did not hear the ringing.

[19] The facts surrounding his missed call and previous discipline record are significant. In some cases I have reduced discipline. I noted the Company's failure in situations to give proper and immediate coaching at the time of rule violations which is inconsistent with the purpose of its own e-testing process. However, I note that after the Grievor was asked if he was aware of each of the Company's attendance obligations and he indicated he did. Yet at the conclusion of the investigation he was given the opportunity to comment or state what he would do differently in future and he said nothing. Clearly he must commit to doing things differently in the future if he returns to service.

[20] In view of all of the forgoing, I find that significant discipline is appropriate. However, I find 30 demerits and dismissal excessive. While the Grievor is a short-term employee he has repeatedly moved and changed terminals to maintain his employment. The majority of the Grievor's discipline flows from incidents in new territory with other short service employees. Overall I cannot find evidence that the Grievor was given coaching or instruction sufficient to meet his obligations. CPKC officers did not take immediate action to bring their concerns to his attention. The Grievor attended all of his disciplinary arbitration hearings before me and presented as an employee who now clearly understands that rule and attendance obligations in a 24/7 safety critical railway operation are not optional. The Grievor has had sufficient time to consider if he wishes to give the dedication necessary to retain his employment. The Company is required to provide a safe workplace and his participation is mandatory.

[21] Given all the facts and circumstances, I find that it is appropriate to exercise my discretion to substitute a reduction of penalty with respect to the missed call. I consider that it is appropriate to reduce the measure of discipline for the missed call to that of significant time out of service to count as suspension. He shall be reinstated into his employment forthwith, without loss of seniority and without compensation for lost wages and benefits, save in respect to maintaining pension eligibility.

[22] I remain seized with respect to the application and interpretation of this award.

Dated at Niagara-on-the Lake, this 29th, day of August, 2023.

Tom Hodges

Arbitrator