

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and -

CANADIAN PACIFIC KANSAS CITY RAILWAY

(the "Company")

Heard *via* Zoom on June 15, 2023 at Calgary, Alberta

DISPUTE:

Appeal of the dismissal of Conductor Darrel Kaczynski of Regina, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Kaczynski was dismissed for the following, "While working as the Conductor on Yard Assignment KR12 on September 25, 2021 and failing to secure any handbrakes on a cut of 8 cars left in track RC02 in Regina yard and providing inaccurate recap information to the Trainmaster. A violation of GOI Section 2, Item 2.2 Testing Hand Brake Effectiveness, Item 2.3 Confirmation of Securement, Items 6.0 & 6.1 Securing Unattended Cars – Yards and Rule Book for T&E Employees, Section 4 - Item 4.2 Communication Requirements."

Notwithstanding that the above mentioned incident warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal.

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, specifically by posing self-incriminating questions (Q.19, 30) and questions outside the scope of the subject matter (Q.26, 29). For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Kaczynski be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above.

The Union contends the discipline assessed is discriminatory, arbitrary, unwarranted, and excessive in all the circumstances, including mitigating factors evident in this matter including the following:

- The ATM did not mention the method used to determine hand brakes were not applied.
- The ATM failed to make recap notes on 6 of the 10 tracks switched by the KR12 assignment. The ATM only made notes for track RF01 at the request of Mr. Kaczynski.
- There was confusions the following day during the discussion between the ATM and Mr. Kaczynski.

It is the Union's position the Company specifically targeted Mr. Kaczynski, and his dismissal is a result of these discriminatory actions.

The Union submits that Mr. Kaczynski 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 alleged vagueness of the Union's request that the grievor be made whole, the Union's positions remain unchanged.

The Union requests that the discipline be removed in its entirety, and that Mr. Kaczynski 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 a fair and impartial investigation. A plain read of the investigation confirms the Grievor's culpability was established and that the questions objected to were not leading, unfair, partial, outside of scope nor asked the Grievor to assume culpability. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

Regarding the Union's allegation that the discipline was discriminatory, arbitrary and excessive, 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.

The Company disagrees with the Union's position that the Company specifically targeted the Grievor. The Company maintains that the Union has not provided any evidence to substantiate their claim of targeting.

The Company maintains that the Grievor was held from service in accordance with the provision of Consolidated Collective Agreement Article 39.06.

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.

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".

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

FOR THE UNION:

FOR THE COMPANY:



Dave Fulton
General Chairman
TCRC CTY West

Lauren McGinley
Asst. Director Labour Relations
CPKC

May 24, 2023

Appearances:

For the Company:

A. Cake Manager, Labour Relations
D. Zurbuchen Manager, Labour Relations

For the Union:

E. Carr Counsel, CaleyWray
B. Wiszniak Local Chairperson
D. Edward Vice General Chairperson, CTY-West
D. Fulton General Chairperson, CTY-East
J. Hnatiuk Vice General Chairperson, CTY-West
W. Zimmer Local Chairperson
D. Kaczynski Grievor

AWARD OF THE ARBITRATOR

I - Background & Summary

- [1] I was appointed to arbitrate this Grievance under a “Letter Re: Grievance Reduction Initiative & Article 41 Final Settlement of Disputes Without Work Stoppage (Arbitration)”, dated March 21, 2022. By that letter, the parties agreed to both *Ad Hoc* Arbitration - similar to what is followed by the CROA&DR - and an Informal Expedited Arbitration process.
- [2] This matter was heard under the *ad hoc* process. It is one of five instances of discipline involving this Grievor, which were heard before me on June 14/15, 2023.
- [3] The positions of the parties are as set out in the JSI. In summary, it is alleged that on September 25, 2021, the Grievor failed to secure handbrakes on eight loaded propane tank cars he had left on RC02 track in the Regina Yard and also failed to provide an accurate recap of what he had done that day to the Trainmaster.
- [4] The Grievor was dismissed on October 22, 2021. The Union has grieved that dismissal.

[5] For the reasons which follow the assessment of 30 demerits is upheld as just and reasonable, leading to the Grievor's dismissal for accumulation. The Grievance is dismissed.

II – Facts

[6] The Grievor is a long-service employee, having been hired by the Company on July 15, 1988. He transferred into the running trades in January 2005. At the time of this incident in September of 2021, the Grievor had 33 years of service, with more than 16 of those years in the running trades.

[7] On September 25, 2021, the Grievor was working as the RCLS Yard Foreman in the Regina Yard, with a Yard Helper. The crew had been given a switchlist and told to prepare cars for the arrival of Train 411.

[8] Train 411 was inbound into Regina. It was planned to do a set off of cars into the planned vacant RC02 track and lift cars that were in the designated F tracks, as indicated on the switchlist.

[9] When the crew finished this task, the Assistant Trainmaster (ATM) asked for a recap from the Grievor, to confirm the RC02 track was clear and all cars had been moved to their designated locations as per the switchlist. According to the ATM, the Grievor indicated that RC02 was "done as per". The ATM stated he wrote "as per" on the switchlist, while the Grievor was present.

[10] The Grievor maintained he told the ATM that it was only "as per" for certain information. The Grievor indicated in the Investigation that he was asked several times by the ATM if it was switched out "as per" and that he said that only the C3 cars had been taken out of the track as per what the C3 cars were listed at, and that his "as per" only related to the C3 cars.

[11] Later, as Train 411 was getting close to arrival in the Regina Yard, the ATM reviewed camera footage of the Yard to ensure RC02 track was clear and to plan the setoff. He then noticed RC02 was not clear, as per the switchlist that had been given and the recap he had been told by the Grievor.

[12] The ATM then physically went to verify the cars in the track.

[13] The ATM wrote a Memorandum on September 26, 2021, outlining his findings when he physically went out to verify the track. This Memorandum was entered into the Investigation of the Grievor as Appendix B.

[14] The ATM stated in Appendix B, that he found two different blocks of 8 cars left in the track. He stated:

I went out and physically verified the cars in track. It was in two different blocks in the track. Reviewing the switch list the 0800 crew only switched out the 5200's and the CN's. They were listed to switch the west traffic into two different blocks into tracks RF01 and RF04, which was the planned lift for 411. This caused 411 to have to setoff on top of traffic that was blocked for the midnight to service customers.

[15] The ATM also stated:

When I was verifying the RC02 track, I noticed that the cars were in two different cuts. There was a cut of loaded Propane cars that were without any handbrakes. I immediately applied the handbrakes, and took pictures.

[16] Those pictures were entered into the Investigation as Appendix D.

[17] At that point, the Grievor's crew was already off duty and had left the yard. The ATM stated he discussed the matter with the crew on the following day.

[18] I prefer the ATM's evidence on the recap to that of the Grievor. I accept on a balance of probabilities that the Grievor told the ATM the work had been done "as per" the switchlist. I did not find the Grievor's information to be credible and found it not only self-serving but illogical. It is not reasonable that the Grievor would have told the ATM he did not perform the work as instructed and the ATM would have just accepted that information without question and not done anything about it when he had ordered that work to be completed a certain way to accommodate Train 411.

[19] The Grievor's evidence is also not consistent with the ATM's evidence that he later looked out and was surprised to see the cars on the RC02 track, which was what prompted him to go out to the track and look at the situation. I find that credible. There would have been no reason for him to do so, had the Grievor already told him those cars were there.

[20] The Grievor was subject to an Investigation, which took place on October 6, 2021. As earlier noted, the Memorandum of the ATM was entered into the Investigation as Appendix B. The Union objected to the pictures attached, due to the lack of car

numbers to indicate they were the disputed cars. I consider the pictures are cogent and relevant evidence and that their legitimacy as the cars in question was established by the ATM's evidence that they were the pictures he took.

[21] The Grievor was asked if the following information from the ATMS's memo was correct: that the ATM went out to verify and noticed the cars in two different cuts, and that there was a "cut of 8 loaded Propane cars that were without any handbrakes", the Grievor stated "that is what Appendix B indicates".

[22] When asked about the discussion with the Grievor noted in Appendix B, where the Grievor told the ATM that "he had no clue about where he lift the cars in RC02. He was saying I left the [sic] all cars together on RC02, which was not true, then he came back with the statement "Even if those cars did not had sic] handbrakes on the east end, there were cars on west end", the Grievor again stated "[t]hat's what Appendix B indicates".

[23] When the Grievor was asked to indicate the details of his conversation with the ATM, he stated:

When he came in we talked about the C2 track. I was confused between the C2 track, C3 and C1 track that he was referring to. The C1 cars out of C3 had to have been shoved into the clear as there was on [sic; no] room on the est end. Between the C2, C3 and C1 tracks I was not quite clear of what tracks he was indicating. I thought he was asking about the cars took out of C2 and moved to C3 (Q/A 16).

[24] When asked if he had indicated that "...I left all cars together on RC02, which was not true, then he came back with the statement [E]ven if those cars did not had handbrakes on the east end, there were cars on west end", the Grievor stated:

I am going back to the confusion between the C2 and C3 track. I wasn't quite sure what he was meaning in the C2 track. The C2 track were also secured, that were shoved back into C2 (Q/A 17).

[25] The Grievor confirmed that he understood - after the track was clarified between he and the ATM - that the ATM was indicating there were no handbrakes applied to the cars in the RC02 track (Q/A 18).

[26] When asked why he allegedly did not apply handbrakes "to the cut of 8 cars on the eastend of track RC02", the Union objected to the question as "self-incriminating"

and suggested the Investigating officer had prejudged the outcome of the Investigation.

[27] The Grievor answered:

The eastend of the cars in C2 were secure with two handbrakes and tested. Riding the tail end of the 8 cars, had come to a stop, once the engines had cleared into the C2 track. I had applied a full automatic brake on the RCLS and applied to the cars. The RCLS control was placed in neutral, the speed selector was in stop. Hands were not placed on the RCLS controller. Three point protection was announced. I had applied two hand brakes on the 4th or 5th cars. After the handbrakes were fully applied I had announced over the radio cancelling three point testing 2 hand brakes. Released the air from the train, I put the controller in coast h2, to allow the engineer brakes to be released. I observed no movement of the 8 cars, then I repeated on the radio handbrakes holding track is secure. I walked up, closed the angle cock and announced going forward KR12, when the cars separated from the standing portion I announced cars went into emergency. I wanted to instruct our LMT Cole that was the proper way to test effectiveness using RCLS, while the car on air.

[28] The ATM was asked about this alleged application of handbrakes during the Investigation. He indicated there was no handbrakes applied to the eastend of C2 when he checked those cars, "they were just holding on to the air" (Q/A 1a). This was determined from his own physical view of the cars.

[29] Regarding the Grievor's statement that he had indicated to the ATM that the "as per" was only the C3 cars, the ATM indicated he asked the Grievor several times if it was 'as per' and the Grievor indicated "yes, everything was as per" (Q/A 3.a). I prefer this evidence.

[30] The Union also objected to a question asking if the Grievor understood that not applying handbrakes to propane cars has the potential to result in a catastrophic event. The Grievor indicated he understood that fact.

[31] When asked if he had anything else to add, the Grievor noted that the ATM was not writing anything down and he had to ask the ATM to write down information on the F1 list, to keep the inventory correct.

[32] The Yard Helper was also called as a witness in the Investigation. He indicated that he heard the Grievor perform a handbrake efficiency test on the 8 cars in C2 prior to cutting off. He was physically with the Grievor, however.

- [33] The Company determined the Grievor had failed to follow instructions and had failed to apply handbrakes. It considered the Grievor's conduct to be a violation of GOI Section 2, Item 2.2 Testing Hand Brake Effectiveness; Item 2.3 Confirmation of Securement, Items 6.0 & 6.1 Securing Unattended Cars – Yards and Rule Book for T & E Employees, Section 4 – Item 4.2 Communication Requirements.
- [34] The Company dismissed the Grievor for this violation. It also felt that his discipline record supported its view that this was a culminating incident.

Arguments

- [35] The Company argued the Grievor's culpability was established and its burden of proof has been met.
- [36] The Company argued the Grievor was aware of which cars were to be switched but went off duty without doing that work; the Grievor was responsible for ensuring securement of the cars; he failed to do so; this failure was confirmed by the ATM; and that failure to secure cars is a significant offence: **CROA 3974**. He also failed to give the ATM an accurate recap.
- [37] It was the Company's position the Grievor was inconsistent and dishonest in the investigation. It noted in the investigation he did not provide the same explanation he gave to the ATM on the day following the incident, which casts doubt on its accuracy. It also noted the Grievor in fact did not dispute the findings of the ATM memo or that the Grievor had said to the ATM that he believed he left the cars all together in RC02 track, which was untrue.
- [38] He also did not dispute his statement to the ATM that "even if those cars did not have handbrakes on the east end, there were cars on the west end".
- [39] The Company argued the Grievor has inferred that the ATM falsely stated that no handbrakes were on the cars when he physically checked them and that he did not need to apply handbrakes to them to properly secure these propane cars. It noted the ATM came in on his day off to have the discussion with the Grievor over this serious issue. The Company also noted the Grievor failed to complete his assigned switching.
- [40] The Company noted the Grievor's disciplinary record is poor and it established the Grievor was given multiple opportunities to demonstrate he can work productively

but that he has now broken the Company's trust. It argued his demerit assessment and dismissal for accumulation was warranted and reasonable.

[41] The Union argued the Company has been unable to establish cause for discipline; that the Company violated the requirements of a fair and impartial Investigation as required by Article 39; and that even if not, the Grievor's version of events should be believed regarding both the application of handbrakes and the recap.

[42] It also argued in the alternative that the discipline was excessive and unwarranted.

[43] The Union argued the questions in the Investigation were leading and presumptive and reflected a predetermination of guilt. It urged the Investigating Officer did not act as an impartial referee and did not carry out the Investigation with an open mind. It relied on: **CROA 1561, 2931; 3322 and 4558.**

[44] Even if that were not the case, the Union urged the Company is not able to establish cause to prove the Grievor did not apply handbrakes to the cars in C2.

[45] It was the Union's position the evidence is not clear, cogent or convincing against the Grievor and that there was no evidence to demonstrate an inconsistency in the Grievor's evidence that he applied handbrakes. It noted there was no witness other than the ATM to substantiate the Company's claim regarding handbrakes. It argued the ATM's credibility should be questioned as he did not make any recap notes. The Union pointed out the Grievor stated in the Investigation step-by-step how the handbrakes were applied and his version should be preferred. It urged the Company cannot explain why the Grievor would have 'feigned' a handbrake test and that his explanation of how he secured handbrakes was accepted without challenge at the Investigation.

[46] The Union argued the securement was also 'witnessed' by the Yard Helper and by a management trainee, Mr. Coroy. The Union argued it was incumbent on the Company and not the Union to question the Yard Helper and Mr. Coroy as to whether the Grievor's evidence was as observed, as it has the burden of proof, but it did not do so. The Union pointed out that the Grievor's radio broadcast was confirmed by Yard Helper. It also pointed out that the moves made by the Grievor would have been reflected in the RCLS download, and it was incumbent on the

Company to access that download to disprove the Grievor's version. It argued there was no impediment to the Company to call Mr. Coroy or access the download.

[47] Even if it could be argued the Company had established cause for discipline, the Union argued that discharge was excessive and unwarranted, relying on **CROA 4381; 4384, 2767 and 2356**. It also urged that several of the Company's arguments were an attempt to expand its positions beyond those advanced in the grievance procedure, which is not allowed between the parties, under this expedited process. It pointed out the Company did not accurately present the Grievor's discipline record, as his discipline on March 11, 2016 was reduced from a 5 day suspension to a 2 day suspension by agreement of the parties.

[48] The Union also noted the Company's objection to a "make whole" order should be dismissed.

IV – Analysis and Decision

[49] I have reviewed the Investigative transcript in its entirety as part of these deliberations. I cannot agree with the Union regarding its concerns with that process. I cannot agree the Investigating Officer failed to conduct the Investigation with an open mind, or that there was a predetermination of guilt. The Grievor had the allegations of the ATM put to him as required and was given the opportunity to address those allegations and call his own evidence to rebut them.

[50] Regarding evidence relating to the handbrakes, the Union has argued there was no evidence to conflict with the Grievor's detailed step-by-step account of setting the handbrakes.

[51] I cannot agree this is an accurate statement.

[52] There was first-hand eyewitness evidence of the state of the rail cars after the Grievor left the yard and allegedly had set the handbrakes. That evidence comes from the ATM, who physically looked at the cars. It is first-hand evidence of the state of the railcars that day, after the Grievor stated he had completed his work.

[53] The ATM's evidence was that he observed the cars where they were not supposed to be (which in itself indicated the Grievor had not finished his work); that he went out to observe the cars; that he found them to be without handbrakes; and that he then applied the handbrakes. The ATM then wrote down his observations in a

memorandum on that same day. That memorandum is contemporaneous with his observations.

- [54] The Union was unable to confront this evidence besides suggesting the ATM was not credible because he had not taken notes of the recap and the Grievor had to remind him to do so. It also alleged the Grievor said step-by-step what he did in the Investigation which was 'not challenged'.
- [55] I disagree with the Union that the ATM's first-hand evidence is not significant. It is difficult to understand what would be significant if this first-hand evidence were to be discounted. I find this evidence to be clear, cogent and convincing, as was noted in **AH2015-369**. The Grievor has not denied saying to the ATM that "even if those cars did not had handbrakes on the east end, there were cars on the west end". He has never explained that statement, or why he would have said that, if in fact he followed the step-by-step process he outlined in the Investigation to set the handbrakes. The Investigation was his opportunity to deny he made that statement and he did not do so.
- [56] I prefer the ATM's evidence of the recap given over that of the Grievor's, which is self-serving, and his first-hand eyewitness evidence of the state of the rail cars when he went out to look at them.
- [57] The ATM's evidence is first-hand evidence of what he physically saw and did that day. He noticed the cars were not where they were supposed to be, which prompted him to go outside, where he saw the handbrakes were not applied to loaded propane cars. He then did the work the Grievor was supposed to do.
- [58] Regarding the Grievor's evidence of his radio broadcast, the Grievor stating on the radio that the handbrakes were set and him physically setting the handbrakes are two separate events. When the Yard Helper was interviewed, he did not indicate he had "witnessed" the handbrake application, but only that he had "heard" the Grievor perform a handbrake efficiency test on the 8 cars in C2 prior to cutting off.
- [59] It should be noted that the LTM was also not standing next to the Grievor to 'observe' what the Grievor did. Like the Yard Helper, if he was present to 'observe' – which was not established – it would only have been if he was listening on the radio. However, the Union did not ask that Mr. Coroy be interviewed as part of the

Investigation. Evidence on what he may or may not have heard on the radio was not gathered. If the Union felt his evidence would be supportive, the Union could have had him interviewed.

[60] While the Union urged this is part of the Company's burden to bring out this evidence, I cannot agree. The Company chose to rely on the first-hand evidence of the ATM to satisfy its burden. It was entitled to do so. That was the Company's evidence and it is compelling, first-hand evidence of which was observed, which observations were recorded contemporaneously to when they were made. It was up to the Union to refute that evidence, if it maintained there is a different version of events. It must establish that version.

[61] I also do not accept the Company was required to download the RCLS, for the same reason. Whether or not that information would have even been available at the time the Grievor suggested he had followed the step-by-step procedure (which I find he did not suggest when asked the next day what had occurred), the Company had already brought sufficient evidence on which it relied to support its burden of proof.

[62] I also find it very curious that the Grievor could set out step-by-step what to do to set handbrakes, in the Investigation, yet when asked by the manager what had occurred the next day, he did not provide that account. Instead, he stated that "even if those cars did not had handbrakes on the east end, there were cars on the west end", which is a statement dismissive of an important safety issue and which implies he didn't set the handbrakes but it "didn't matter" because of the presence of the other cars.

[63] The Grievor never denied or explained this statement when he was given the opportunity to do so. This statement was inconsistent with his assurances that he carried out a step-by-step process to set the handbrakes.

[64] I find it more likely than not that the Grievor – regardless of what radio transmission he made – did not set the handbrakes to secure the loaded propane cars, as required. I can find no basis on which to doubt the ATM's evidence that when he went out to the cars, no handbrakes were set and I find that it has been established on a balance of probabilities that the cars were not secured. His evidence is cogent and convincing on this point.

- [65] I also accept that the Grievor created a very dangerous safety situation by failing to secure loaded propane cars, which danger is self-evident in this industry.
- [66] The Company has satisfied its burden of proof to establish on a balance of probabilities that the handbrakes were not set on the disputed cars.
- [67] Further, I accept the cars were not where they were supposed to be, according to the switchlist when the ATM went out to look at the situation. The Grievor did not perform the work he was assigned to do.
- [68] I cannot accept the Grievor's explanation that he told the ATM of the change he made to the switchlist in his recap. I found that evidence to be self-serving and illogical. I am satisfied the Grievor left the yard having not completed his assignment, with no communication with the ATM and that culpability has also been established for this act. The failure to communicate with the ATM is repeat conduct from his previous discipline (as discussed in **AH857**).
- [69] Some level of discipline is warranted.
- [70] Once culpability is found and some level of discipline is warranted, the 30 deferred demerits from September of 2021 are activated. Combined with the 20 demerits from **AH857** and the 10 demerits from **AH856**, that means the Grievor is sitting at 60 demerits and dismissal, *even if* no demerits are issued for these events. Discharge would follow, regardless of the demerits issued for these events.
- [71] However, the appropriate level of discipline will still be assessed.
- [72] The Union has noted that only certain types of conduct supports "outright dismissal": **CROA 2356**. However, dismissal in this case does not result from this "one offence" but because of the accumulation of demerits. That is distinguishable.
- [73] In **CROA 4384**, which substituted a suspension for a discharge, a "communication error" was found in a failure to test brakes. In this case, there was no "communication error" found so that case is distinguishable. Neither is this a case where the Grievor applied a handbrake incorrectly, as in **CROA 4381**.
- [74] Turning to the factors to be considered in assessing reasonableness¹, I agree with the Company that failing to secure loaded propane cars sitting on a track is a

¹ *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. 98

serious, significant offence in this industry, which is an aggravating factor for discipline.

- [75] Failing to complete a work assignment and being dishonest about the communication with the ATM is also a significant and serious violation. It is also a repeat violation for this Grievor, which is aggravating.
- [76] Regarding the impact of the Grievor's disciplinary record on an assessment of discipline, it must be first emphasized that it is the entirety of his record which is relevant when assessing discipline, and not just whether the Grievor has a prior history with the securement of trains.
- [77] The Grievor's disciplinary record is poor, which is aggravating.
- [78] Reviewing just the past five years, the Grievor has been disciplined 12 times between February 3, 2016 and September of 2021. While one incident was for failing to have a periodic medical assessment completed, the other 11 related to his work conduct. The discipline has ranged from 2, 5, 7 day suspensions to 10, 20 and 30 demerits. The incidents included run throughs of switches, incorrectly reporting of inventory leaving cars behind, interaction with a trainmaster that resulted in a violation of the Harassment and Discrimination Policy, failure to protect the point; profanity over the radio and riding a lead tank car incorrectly while shoving equipment.
- [79] Considering just the one year between November of 2020 and October of 2021, the Grievor received a 30 day suspension for failure to protect the point (reduced to a 20 day suspension in this process; **AH858**); 10 demerits for profanity over the radio (upheld as reasonable in this process; **AH856**); 20 demerits for failing to follow instructions for spotting specific cars to a customer facility (upheld as reasonable in **AH857**); 30 deferred demerits in lieu of dismissal in September of 2021 for riding a lead tank car incorrectly while shoving equipment (which was not grieved); and 30 demerits and dismissal for accumulation on this same date for failing to use proper radio positive identification while switching cars (under grievance and decided in **AH860**). Looking at the 10 years prior to 2016, he been assessed discipline for six incidents, five of which related to his work conduct, with discipline ranging from 10 to 45 demerits.

- [80] That the Company has lost its trust in the Grievor is not a “new issue” that must be raised in the JSI to be “argued”. Rather, it is the result when considering the facts of this case in combination with the Grievor’s record.
- [81] I agree with the Company that the Grievor’s disciplinary record is aggravating as it is very poor. It also demonstrates a concerning pattern that is also seen in this case: The Grievor tends to make his own assumptions, fails to follow instructions and fails to follow – and is dismissive – of safety rules. When this tendency surrounds loaded propane cars left sitting on a track without securement, it must attract significant discipline.
- [82] While the Grievor is a long-service employee - which is mitigating - that is only one factor to be considered and it must be placed in context of what that service has looked like, as demonstrated in the Grievor’s disciplinary record. That factor is not sufficient to overcome the other aggravating factors, which in this case are also significant.
- [83] As noted above, no matter what level of discipline is assessed, the Grievor will be dismissed for accumulation when his deferred discipline is triggered.
- [84] Considering all of the factors, I do not consider the assessment of 30 demerits – which is half way to dismissal under the Brown System - is inappropriate, excessive or unwarranted for leaving cars loaded with propane without securement on a track, for a Grievor who has long-service but a poor disciplinary record. Had the Grievor’s long service been married with a better disciplinary record, that result may have been different.
- [85] I wish to point out that the Union has done an admirable job in attempting to defend this Grievor. It is a most unfortunate situation when a long-service Grievor loses his job when he is close to retirement. In this case, however, the Grievor has had choices to make and opportunities given.
- [86] The Grievance is dismissed. The assessment of 30 demerits is reasonable. The Grievor’s termination for accumulation of demerits is upheld.

I reserve jurisdiction to address any issues with the implementation of this Award, and to correct any errors or omissions to give it its intended effect.

October 20, 2023

A handwritten signature in blue ink, appearing to read "Cheryl Yingst Bartel". The signature is fluid and cursive, with the first name "Cheryl" being the most prominent.

Cheryl Yingst Bartel
Arbitrator