AH863

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and –

CANADIAN PACIFIC KANSAS CITY RAILWAY COMPANY

(the "Company")

Heard *via* Zoom on June 14, 2023, at Calgary, Alberta

DISPUTE: The dismissal of Locomotive Engineer Mark Johnson, of Nelson/Trail, B.C.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Johnson was dismissed for the following reasons:

For improperly paying yourself by making multiple inappropriate wage submissions under the Honour System of Pay between January 1, 2021, and June 14, 2022, while working as Locomotive Engineer on the Kootenay Valley Railway.

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

UNION'S POSITION:

The Union contends that the investigation was conducted in an unfair procedure, this is based upon the time between the claims and the investigation. The Company has had more than ample time to review these claims and decided to wait until years later to investigate them.

The Union further contends that the actual Engineer claims that Engineer Johnson is accused of inappropriately submitting have not been clearly identified and until such time, the Union reserves the right to argue the individual claims.

The Collective Agreement allows for the local Managers to review and approve or disapprove any claims, the claims in question have been approved for years. In this case verbal agreements were made with Managers to approve these claims; however, these Managers have now denied any agreement of approving these claims which they approved in the past years and have now broken any bond of trust between the Union and Company.

During the investigation Engineer Johnson was honest and forthright with his answers, he supplied a detailed honest explanation of the claims in question. He made no attempt to mislead the investigation in anyway.

Based on these reasons and facts, the Union contends the discipline imposed is unwarranted, unjustified, and excessive.

For the foregoing reasons and those advanced through the grievance procedure we respectfully request that the dismissal be expunged from Engineer Johnson's record and that he be made whole for lost wages with interest in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION

The Company has denied the Union's request.

Mr. Johnson was subject to a payroll audit carried out by T&E Honour System Audit Specialists. During this audit it was discovered that claims being made by Mr. Johnson were not covered under the terms of the KVR Collective Agreement while working as an Engineer/Conductor on the Kootenay Valley Railway.

The Company maintains the Investigation was fair and impartial. The Company carefully reviewed the objections raised during the statement as well as details of the Union's objection in its grievance. A plain read of the statement confirms the grievor's culpability was established and that the question(s) objected to were not leading, unfair, partial nor was the grievor asked to assume culpability.

There is no statute of limitations on time theft. When the Company became aware of the situation, they immediately investigated the events as necessary. The Company's decision to dismiss Mr. Johnson was following a fair and impartial investigation. The investigation established there were multiple inappropriate wage submissions which have all been identified in the statement.

It comes as no surprise that the Union takes the position that they are unaware of what these claims are.

The Company doesn't understand the Union's assertions regarding "verbal agreements" with Managers. The investigation established that Mr. Johnson made wage claims where there was simply no entitlement.

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 the Grievor's service and discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

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 THE COMPANY:**

Greg Lawrenson
General Chairman
Relations
TCRC LE – West

Chris Clark
Manager Labour

CPKC

May 29, 2023

Appearances

For the Union

K. Stuebing	Counsel, CaleyWray
Greg Lawrenson	General Chair
Chuck Ruggles	Vice-General Chair
Cam Pfaff	Sub Local Chair
Mark Johnson	Grievor

For the Company

Chris Clark	Manager, Labour Relations
John Bairaktaris	Director, Labour Relations
Gurit Gill	T&E Honour System Audit Specialist (Observer)

AWARD OF THE ARBITRATOR

Analysis and Decision

Summary

[1] This Grievance was heard under a "Letter Re: Grievance Reduction Initiative & Article 41 Final Settlement of Disputes Without Work Stoppage (Arbitration)", dated March 21, 2022.

[2] According to that document, the parties agreed to both *Ad Hoc* Arbitration and Informal Expedited Arbitration processes, similar to what is followed by the CROA&DR. This matter was heard under the *ad hoc* process.

[3] For the reasons which follow, the Grievance is dismissed.

Facts

[4] In 2021 and 2022, the Grievor was mostly working as a Conductor on the KVR, with occasional work as a Locomotive Engineer.

[5] At the time of the incidents giving rise to this discipline, the Grievor had 18 years of service, with 14 years of that service on the Kootenay Valley Railway ("KVR"). The KVR is covered by a Collective Agreement referred to as the "KVR Agreement". The KVR Collective Agreement, Article 5.1, p. 12 Appendix "C" provided that "Employees governed by the Collective Agreement will be subject to a flat method of pay".

[6] After his hire, the Grievor worked for four years under what will be referred to as the "Core Agreement", which pays for services for T&E employees differently than those who work on the KVR are paid.

[7] While working for the KVR, the Grievor made multiple claims for pay under the *Core* Agreement, to which he was not entitled. This was discovered through an audit of the Grievor's time. It was determined that between January 1, 2021 and June 14, 2022, the Grievor had submitted improper wage claims in the amount of $12,652.63, involving 136 distinct wage claims.

[8] This is not a case involving disputed entitlement. No grievance has been filed that the repayment of these claims to the Company was not appropriate.

[9] There was a dispute between the parties of whether the Grievor knew or understood the Company's Honour System of payroll or had read or understood the Honour System Manual.

[10] The Union argued that while the Grievor was aware of the Honour System of Pay, he had never been educated on it and that the KVR Agreement applied. It argued this goes to the *mens rea* for establishing deception.

[11] The Company pointed out the Honour System had been in place since 2001, the Grievor was hired in 2004 and had worked under that system from 2004 to 2008, as well as submitting thousands of claims under the system since that time, at the KVR.

[12] I am prepared to find that the Grievor was aware of the Honour System of Pay, which had been introduced in 2001. Its introduction was *before* the Grievor was hired in 2004, so he had worked his entire career under the Honour System of Pay. While the Union argued the KVR Agreement applied, the Honour System of Pay is not inconsistent with the KVR Agreement, but is how the payments owing under the KVR Agreement are made.

[13] The Grievor had thousands of tie-ups over his 18 years of service and submitted thousands of claims for his work under that system. I do not find it credible for the Grievor to suggest that he "did not understand" the system under which he had been submitting time claims for 18 years, or that he was ignorant that all claims are automatically approved but are subject to audit. His explanation was not accepted as credible, given this experience.

[14] It is also no answer for the Grievor to suggest he chose not to read the Manual which governed how he was paid. The Grievor was responsible for the accuracy of his own wage claims. The Manual was there to be read and understood.

[15] An Investigation was conducted.

[16] At Q/A 19 the Grievor was asked if he believed he was "entitled to methods of pay from both the CCA and the KVR collective agreements". His answer was "Not

now, but at the time of some of these claims I was coerced by the bad advice of former local chairman Al Restrick, an employee who has been here since the inception of the KVR." The Grievor also noted Mr. Restrick was a former Local Chairman of the Union, to explain this reliance.

[17] When asked to explain how he was "coerced", the Grievor stated that Mr. Restrick would stand over him at tie-up and tell the Grievor his credentials and why they were entitled to the payments. The Grievor also stated "I let Al coerce me into believing these were legitimate claims".

Arguments

[18] The Company argued the Grievor knew about the Honours System of Pay, which all Train & Engine employees in Canada worked under for the past 20 years. It maintained that system placed those employees in a unique position of trust. It argued the Grievor had worked under that system for 18 of those years and knew he was responsible for the accuracy of his own wage claims. It argued he saw an opportunity to take advantage of that system through making unauthorized submissions. It urged the Grievor knew and understood claims were automatically approved and may be subject to a random audit and that he had an intent to deceive the Company and manipulate his system of pay. It argued his actions were not inadvertent or passive. It urged this was not mere inattention or carelessness, clerical error, slip or mistake, but was a well-thought out and intentional act to increase his pay for his own gain. It argued the Company investigated as soon as they became aware and the Investigation was fair and impartial.

[19] The Union argued the Company was in breach of the Grievor's substantive right to a fair and impartial investigation based on failure to provide particulars and the delay in proceeding with allegations from January of 2022. It argued the Grievor had a right to a timely Investigation and it was prejudicial to have allegations of misconduct "withheld from an employee" for a "substantial period of time". The Union argued in the alternative that time theft is a serious allegation which requires a high level of proof which has not been met in this case. It urged the Grievor was acting in accordance with a posted Bulletin KVR010-11: New KVR Tie-up and Claim Codes", on several of those claims and others had been approved by

managers. While the Grievor stated he was always aware of the Honour System, he had never seen the Manual until this Investigation, which went to his ability to form intent to deceive.

Decision

a) Investigation

[20] The Union argued the Investigation was unfair and impartial. I cannot agree that the Company has "withheld misconduct" from the Grievor for a "substantial period of time" as argued by the Union, or that the allegations were vague. The nature of an honour code system is that all time is approved and could be subject to a later audit. The chance of an audit is what supports the "honour" to be exercised. Audits are not unreasonable under this type of system.

[21] An "audit" implies some time may go by between the offence and the audit, as an audit by its nature is performed later in time. I do not agree this delay results in an Investigation which is either unfair or impartial to the Grievor, or that in doing so, misconduct allegations are being "withheld" from the Grievor because the Company was not aware of his improper claims. If the Grievor followed the rules, the audit would show no issues. I do not find the ability to audit conduct at a later date to be unreasonable or to cause prejudice to a Grievor who is found by that audit to have not followed the rules for his wage payment.

[22] The jurisprudence relied on by the Union can be distinguished. For example, in **CROA 3011**, there was one specific incident relating to a female passenger at issue. That case did not involve time theft. **CROA 3322** involved misrepresentation of an alleged injury. That case is also distinguishable and did not involve ongoing time theft under an honour system that was subject to audit.

b) The First Wm. Scott Question: Has an Offence Occurred?

[23] An arbitrator must review a discipline decision to determine a) if an offence has occurred; b) whether the discipline assessed is excessive; and – if so – c) what other penalty should be substituted as just and reasonable: *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. 98. Several factors are listed in that case in assessing the second and third questions, which can carry a mitigating, aggravating or neutral impact, as noted later in this Award. A broad determination must be made of

whether a Grievor with significant service should ultimately lose his job for the offence. Every case depends on its own facts.

[24] Considering the first question, I accept the Grievor has demonstrated past commitment to the Company, as evidenced by the October 7, 2018 Memorandum to file to recognize his hard work. His discipline record is favourable, with the next most recent discipline to this event occurring back in 2005 and then being only minor assessments.

[25] Against these positive facts, however, are pitted the troubling circumstances of this case.

[26] The Grievor was questioned regarding the details of several claims. Certain details he could not recall given the passage of time, certain claims he stated had been approved by Trainmaster Mackenzie, and other claims he stated had been made by him on "bad advice" from Mr. Restrick.

[27] The Grievor did not explain how he was lulled into this "coerced" state of being, why he did not question Mr. Restrick's assurances of entitlement of pay under codes which related to a different agreement, why he did not check with management himself, or why he did not check the terms of the collective agreement for himself to determine whether he was entitled to payment under the codes which related to the Core Agreement, and not the KVR Agreement.

[28] It is not necessary for the purposes of this question to delve into the details of the over 136 claims the Grievor made. This expedited process of arbitration does not lend itself to that degree of review, nor is it necessary to my determination in this case. In my view, there are two specific instances which support the Company's decision to discipline the Grievor for time theft, no matter what other excuses or reasons the Grievor had for many of the individual claims (such as support from a manager; or following a Bulletin).

[29] First, there are some general comments to be made regarding the Grievor's explanation that he was "coerced" by Mr. Restrick.

[30] An adult without cognitive limitations always has a choice regarding his actions. Mr. Restrick did not hold a gun to the Grievor's head and make him input

questionable time codes. I do not find the Grievor's explanations that he was acting on Mr. Restrick's advice acts to negative his own intent or supports the argument that he had no intention to defraud or deceive the Company. The Grievor had an independent responsibility to ensure he was entitled to claims he made for *his* time, and that those claims were supported by the pay scale under the collective agreement which applied to him.

[31] The Grievor's explanation is that he was intimidated – "coerced" - by Mr. Restrick. That intimidation would have resulted because the Grievor realized that if he did not make the same claim as Mr. Restrick made on a particular day, that could raise a red flag for the Company for Mr. Restrick's claims. However, that very feeling of intimidation demonstrated the Grievor was aware he had a choice to make.

[32] The Grievor succumbed to that pressure instead of exercising his other choice, which was to ask his own asking questions regarding entitlement. The Grievor did not escalate any of the claims on which he added his notes by seeking out the advice of a manager to ask if he was entitled to payment based on a different agreement than the one under which he worked. A quick question to management of whether core agreement codes applied to KVR employees would have resolved the issues. The Grievor decided not to ask that question but to follow what Mr. Restrick was doing. That demonstrates intent to deceive.

[33] The Union relied on **CROA 3409**. That was a specific fact situation where a grievor was unsure of whether to claim for certain time in view of the date he was asked to sign a continuing employment agreement by the Company, so sought out his current local Union representative, who was wrong. In that case, it was found the claim was one that *would* be approved or examined by a Company officer and so the arbitrator was not satisfied of any intent by the grievor to deceive the Company: "The overall evidence does not support the Company's theory of an attempt at fraud, concealment or the equivalent of theft on the part of the grievor".

[34] In that case, the arbitrator accepted that the Grievor with 20 years of service had not been "dishonest or reckless with the truth" but was rather guilty of an "unfortunate lack of judgment" (at p. 4).

[35] In **CROA 3409**, the arbitrator did not find that the "degree of trust between the grievor and the Company is irrevocably broken" (at p. 5) as no fraudulent intent was found.

[36] That case is distinguishable from this case. The Grievor's explanation of reliance on Mr. Restrick because he was a "former" Union official was not convincing. it is disingenuous for the Grievor to maintain he was relying on advice from "the Union" in choosing his time codes. In this case, there was no attempt to seek advice from "the Union" as to what should be charged. Rather, the Grievor allowed himself to be intimidated by a former Union official who he was working with and was aware had his own stake in getting the Grievor to put the same time codes as he intended to put in, since they were on duty together.

[37] That is not the same thing as reliance on the "Union" for advice about appropriate wage claims.

[38] I further accept the Grievor was aware of this "conflict of interest" relating to Mr. Restrick's advice, as he described Mr. Restrick's behaviour as "coercion" by "standing over him" to make sure he put in the same codes. This behaviour by itself should have caused the Grievor to seek out advice of whether those codes were correct. He did not do so. It was the Grievor's choice to be intimidated, rather than ensuring the claim was legitimate. That demonstrated intent to deceive. If he did not have this intent, he would have asked the appropriate questions.

[39] Neither do I find it convincing that the Grievor thought his local manager was "vetting" all of his time claims and that when they were not "kicked back" he accepted they were approved. The Grievor's explanation of putting "remarks" on a wage claim does not absolve him of the responsibility for entering his time correctly *in the first place,* or relieve him from the need to seek clarity before claiming entitlement. An analogy would be walking into a store, taking a loaf of bread without paying for it and – when caught – suggesting you did nothing wrong, as you expected the security guard to catch you on the way out. It is not the Company's job to "catch" the Grievor's improper claims.

[40] The Grievor's explanation of "time vetted by management" also has a logical inconsistency with his explanation that he was "coerced" by Mr. Restrick.

[41] If the Grievor honestly believed he had been entitled to the payments he claimed - because management was vetting all of his claims - he would not have described Mr. Restrick's behaviour as "coercion". Frankly, he would not have needed Mr. Restrick's advice at all. The Grievor cannot have it both ways: either he felt coerced or he felt entitled to the payments as tacitly approved by management.

[42] This case is not similar to **CROA 2854** where there was only "carelessness or indifference" found by the arbitrator, in whether higher rates were payable. That case is distinguishable from these facts.

[43] There are two particularly troublesome claims which the Grievor would have been well aware he was not entitled to, no matter what Mr. Restrick said, but which he claimed anyway. These two instances - by themselves – establish intent to defraud the Company and support the Company's decision to discipline the Grievor for time theft.

[44] The first claim was for excessive switching. The Grievor explained that anytime he performed excessive switching, he paid himself work train rates using the CT terminal allowance claim code. While the KVR Agreement *does* allow for such a payment, the Manager must be involved. When the Grievor was questioned regarding a certain claim at Q/A 45, it became clear that the claim he made for excessive switching did not even meet the threshold for excessive switching as it was a simple set off of 5 cars. The Grievor's explanation again was that this was claimed on the "bad advice" from Mr. Restrick, who maintained they were "entitled" to it.

[45] I do not accept the Grievor – as an 18 year veteran - was not aware this was not excessive switching. To make a claim for excessive switching when excessive switching did not occur demonstrates intent to defraud the Company.

[46] A second incident involves work claimed for October 16, 2021. The Grievor claimed $2,535 on that day, with seven different entries, including HR claims totaling $1,014.00. While an HR claim is a standalone claim which provides payment for 100 additional miles to a work train crew when handling revenue cars

not associated with the work service being performed, that provision is not found in the KVR Agreement, so is not payable to KVR employees.

[47] At Q/A 135, the Grievor admitted his wages for the day *should have been* $676 plus overtime of $338, which total of $1,014 is less than half of what he claimed.

[48] The Grievor's only explanation was that at the time he performed the work, the "claims made sense". At Q/A 131, the Grievor states: "At the time I felt it made sense, but I made sure to include detailed comments that I expected to be vetted by my local manager in a time fashion prior to their approval". Putting comments for a manager did not explain why the claim "made sense" to the Grievor. The Grievor never explained how claiming for pay under a different collective agreement than he worked under "made sense" to him. Putting down remarks for management to see did not provide that explanation.

[49] I am satisfied this incident demonstrated the Grievor had the requisite intent to deceive the Company by claiming for more time than was appropriately payable, resulting in time theft. Unlike the grievor in **CROA 3409**, I do not find there was a "genuine degree of confusion" in the Grievor's mind regarding his entitlement to more than double what he should have been paid on October 16, 2021.

[50] The answer to the first question is "yes", the Grievor had intent to defraud and deceive the Company through time theft. This was conduct deserving of discipline.

b) *The Second Wm. Scott Question: Was Discipline Reasonable?*

[51] Considering the second and third *Wm. Scott* questions, time theft is a serious and significant offence in *any* industry. Time theft erodes – if not extinguishes – trust between an employee and his employer. In *this* industry, its seriousness is heightened by the responsibility entrusted to T& E employees who work largely unsupervised, through the Honour Code system of payroll.

[52] The Grievor's disciplinary record is strong and he has substantial service. However, these factors are overshadowed by the significant aggravating factors which exist in this case.

[53] The nature of the offence is an important factor The offence was not a "one time" event. Both the seriousness of the offence and the fact it occurred multiple times are aggravating factors. The Grievor's choice to bow to perceived intimidation instead of ensuring entitlement is also aggravating. The incident of October 16, 2021 is problematic for the Grievor. Standing on its own, this incident supports significant discipline for time theft, *even if* the other 130+ incidents had not occurred. No explanation was provided by either the Grievor or the Union of how that claim "made sense". This explanation was vague and unconvincing and lacked credibility.

[54] An arbitrator must consider globally whether the offence is such that it justifies the Grievor losing his employment.

[55] Upon consideration of all of the facts, submissions and jurisprudence, the two particularly troublesome claims would – on their own - justify dismissal. When paired with the balance of the evidence, the conclusion is inescapable that the bond of trust which the Company must have with the Grievor – a bond that is essential under the Honour Code System of Pay - has been irrevocably broken.

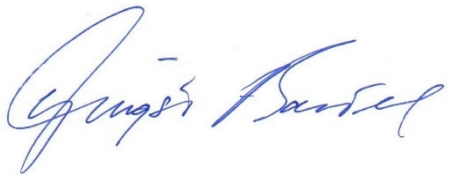
Conclusion

[56] The decision of the Company to dismiss the Grievor for time theft was a just and reasonable response.

[57] The Grievance is dismissed.

I remain seized to address any questions regarding the implementation of this Award, and to correct any errors or omissions to give it the intended effect.

September 5, 2023



CHERYL YINGST BARTEL

ARBITRATOR