IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC KANSAS CITY RAILWAY

Company

and

CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE IBEW

Union

Grievance of N. Ousten

Arbitrator: C. Yingst Bartel

Hearing Date: October 16, 2024

Date of Decision: March 10, 2025

Appearances:

For the Union:
Denis Ellickson, Counsel
Gurpal Badesha, GC (West) IBEW
Brad Kauk, Asst. GC (West) IBEW
Steve Martin, IBEW Intl. Rep.
Nicole Ousten, Grievor

For the Company:
Lauren McGinley, Director, Labour Relations
Rene Araya, Labour Relations Officer
Kevin Ehnes, Director S&C Operations (West)

AWARD OF THE ARBITRATOR

Background Facts & Issue

[1] This was one of three grievances scheduled to be heard on October 16 and 17, 2024, on an *ad hoc* basis. The parties have consented to my appointment and agreed I have jurisdiction to hear and determine the matters at issue in this Grievance.

[2] While the parties had agreed to be bound by the "rules and procedure" of CROA for these *ad hoc* hearings, a preliminary issue arose regarding which CROA Agreement applied to these hearings. That dispute was resolved in **AH896**.

[3] As the 2004 CROA Agreement was found to be applicable, no time limits were imposed by this Arbitrator on the parties' presentations. Despite the lack of time limitations – and to the credit of the representatives of both parties - we were able to conclude the hearing of both **AH896** and this hearing within the time booked. A third case was begun, but was required to be continued at a later date.

[4] At issue between the parties in this Grievance is whether the Grievor was culpable for falsifying Company records, and – if so – whether the discipline of dismissal was just and reasonable in all of the circumstances, both mitigating and aggravating. These questions arise from the well-established analysis known as the *Re Wm. Scott* framework.

[5] The first question is whether the Grievor was culpable for falsifying records as alleged by the Company. If no culpability is found, the analysis ends there. If culpability is found, the second and third questions arise, which involve an assessment of the reasonableness of the discipline.

[6] For the reasons which follow, I am satisfied the Grievor *was* culpable for falsifying Company records without a reasonable or credible explanation and did not just make a "mistake". I am further satisfied that the discipline assessed was just and reasonable, in all of the circumstances.

[7] The third *Re Wm. Scott* question of the substitution of appropriate discipline does not therefore arise.

Facts

[8] As noted in **AH650**:

> That department is responsible for ensuring the maintenance, repair and testing of the systems and equipment that ensure the safe movement of trains through the rail network. The position of S&C Maintainer is a safety sensitive one and employees can work with little supervision. The role of the S&C Maintainer is crucial to the safe operation of the trains as, among other things, they perform tests and inspect the signal system and the crossing protection equipment. The job involves mandatory testing and inspection, governed by the S&C general instructions (at p. 2, 3).

[9] Given the importance of signals to the rail industry, periodic inspections and maintenance of equipment are mandated by Transport Canada. The Company can be fined by Transport Canada if the required work is not performed.

[10] As noted by the Company, 85-90% of the job of an S&C Maintainer involves testing of equipment. Maintainers work with little supervision, and cover a certain geographical area. I am satisfied that the testing performed by an S&C Maintainer is required to be entered into an electronic system known as "Raildocs" once complete, which provides the record of the completion of that work; and that this task is often performed once the S&C Maintainer returns to their vehicle, given the tight timelines for working around the track (in this case working in the MacDonald Tunnel).

[11] The Grievor had nine (9) years of service at the time of the incident in question. She had worked as an S&C Maintainer since January of 2017, which was approximately seven (7) years before her dismissal. I am satisfied the Grievor knew – or should have known – of her responsibilities not just to perform the required testing at issue in this case, but to also correctly enter that work in the "Raildocs" system once it was completed.

[12] It is not disputed by the parties that on November 6, 2023, the Grievor was to perform certain testing in the MacDonald Tunnel, including relating to batteries located in Bays 4 and 9 in the MacDonald Tunnel. The Grievor was granted certain track occupancy permits, to allow her to perform this work. The Grievor's evidence was that she spent the bulk of that day in the MacDonald Tunnel. During that time period, her evidence was that she performed two "3 month regulatory tests" in that Tunnel, as required. Those two tests were to be performed in Bays 9 and 4.

[13] The Grievor entered into Raildocs that the tests were performed in each of these Bays.

[14] However, it was later discovered by a third party contractor on December 23, 2023, that the water levels in the batteries in Bay 9 were dangerously low. They would not have been low had the Grievor performed the required testing. On January 4, 2024, Mr. Chouinard went to Bay 9 to look at the log books and battery cards. His evidence was he found no record of the 3 month test being performed, consistent with the concerns raised by the third party contractor that this testing was not performed.

[15] The Grievor was investigated in late January 2024.

[16] Further facts will be addressed in the Analysis section of these reasons, as they relate to the credibility of the Grievor's explanations.

Arguments

[17] Given the disposition of this case, it is unnecessary to address the Company's argument that the issue of the fairness of the Investigation was not appropriately raised by the Union.

[18] The Company argued the Investigation was fair and impartial; that the Grievor's culpability was established; and there was just cause for its level of discipline. It argued the Grievor's role was "…crucial to the safe operations of trains and equipment" and that it was of utmost importance for S&C Maintainers to comply with rules. It pointed out the Grievor was employed in a safety-sensitive position and that Transport Canada and the Company both imposed requirements for the Grievor's work. It noted the position works with little supervision, over a large geographic area.

[19] It also argued the Grievor had a significant disciplinary record and her employment was already at risk. It noted that the batteries at issue in this case required visual inspection and voltage checks every 3 months and that the functioning of those systems impacted train operations. It argued that failure to inspect as required could result in the Company being assessed significant fines by Transport Canada. It pointed out that Bay 9 controlled the mid-tunnel signal 838/839 and if this signal had failed, there could have been a dangerous situation. It argued that for battery level water to drop below a certain

level could lead to the battery exploding, or to damage to wiring and devices, and a track circuit could be taken down. It argued the Grievor in this case had an obligation to perform the mandatory testing but failed to perform the testing and yet recorded it as completed and left the location at Bay 9 in risk of failure. It argued the batteries were in "dire" condition when found by the third party contractor. It argued the Grievor was culpable for falsifying the regulatory testing record, and was properly subject to severe discipline. It argued the Grievor was well-oriented to the MacDonald Tunnel. It argued dismissal was not excessive, relying on several authorities. It noted the Grievor's significant disciplinary record during her service; and argued the bond of trust with the Grievor was broken, given the Grievor failed to be candid and forthright with the Company. The Company also took issue with the Union raising an issue regarding the fairness of the Investigation, as it argued it had not appropriately been put into issue.

[20] The Union raised issue with the fairness of the Investigation. It relied on the Company's delay in raising the allegations with the Grievor, which it argued contributed to the Grievor's inability to recall exactly her work that day. It noted an Investigation was not carried out until 78 days after the work was performed; that circumstances leading to this delay were "inexcusable"; and that the discipline should be *void ab initio* as a result. It argued the Company withheld this serious allegation from the Grievor, to a prejudicial effect, which explained the Grievor's difficulty recalling her duties on November 6, 2023.

[21] Alternatively, while the Union agreed that if falsification were established, that would be serious misconduct, it argued that was not established in this case. It Union argued the Company was unable to establish culpability that the Grievor intentionally completed the Raildocs records erroneously and so had failed to establish the Grievor's culpability. It argued the Grievor could have simply "*made a mistake in her entries into Raildocs based on not being able to determine exactly which bay she performed work in on November 6, 2023*" (at para. 45). It pointed out after this event she told her manager she did not have time to complete a log book, which it argued a deceitful person would not do. The Union also argued there were a number of "key facts" which it argued contributed to what it described as the Grievor's "unfortunate error" on November 6, 2023, which were not adequately considered by the Company. The Union argued the Grievor had made a "unfortunate, yet serious error" but not one which could be divorced from

these circumstances. These facts included her lack of familiarity with the MacDonald Tunnel, the difficulty in identifying the battery door numbers due to coal dust and debris in the tunnel; and the heaviness of those doors which all compounded the "downward pressure" from the Company to "minimize maintenance downtimes". It argued an employee could not "lollygag" in this nine mile Tunnel; that there was no sunlight; and that it was a challenging work environment. It argued it was therefore "not surprising" that the Grievor's work began to suffer and that record-keeping errors "may have occurred". It argued that in this case, the Grievor lost track of each location she completed testing at; and pointed out her evidence was that she could have performed the test in Bay 8 or 10. It argued the Company's actions were "heavy-handed" given the Grievor's plausible explanation that she did not know exactly what Bay she was working on, but did perform two tests.

[22] It also took issue with the log books and the battery testing cards relied upon by the Employer; argued that the Employer failed to properly train the Grievor on the modes for the ventilation systems in the Tunnel, which all contributed to a state of "rush" on the part of the Grievor, which led to mistakes and errors, "such as failing to determine exactly which bay work was being performed" (at para. 44). The Union argued that even if culpability were established, the "mistake" made by the Grievor does not warrant dismissal. It pointed out the Grievor had "zero demerits" at the time of her dismissal; that there were 78 days between her work and investigation to explain her lack of recall; that this was an "unintentional, very regrettable, mistake" (t para. 47) and not a "deliberate records falsification" (at para. 47); that the Grievor's previous discipline largely related to issues other than record-keeping; and that her nine years of service all acted in mitigation. It argued this case was distinguishable from those where dismissal was upheld. It also argued that there is no formal doctrine of "culminating incident" for CROA adjudications.

Analysis and Decision

The Investigation

[23] The Union raised an issue with the delay from when the work was completed and when the Grievor was interviewed, suggesting this delay acted to explain certain of the Grievor's confusion – rather than credibility issues relating to her explanations. It argued

this was the case even if "technically" the Company was within the agreed upon time period to do so. The Company argued the Union did not properly raise issue with the Investigation.

[24] That issue can be resolved quite easily. Even if the Union's arguments were accepted, the Company did not discover the issue until late December of 2023. Given the impact of Christmas, it was not unreasonable for Mr. Chouinard to go to the Bay on January 4, 2024 to look at the situation, and for the Grievor to then be interviewed before the end of January. Any obligation for the Company to investigate the Grievor would not arise until it was aware of the issue.

[25] I am satisfied the Interview took place within the time period in which the parties agreed it could take place. It is therefore not accurate to describe this as only "technical" adherence by the Company, as if the Company were at fault. If the Union is concerned with the amount of time and the impact on memory from that time period, they can negotiate a different time period. The Company was in compliance with the Collective Agreement.

[26] Further, that type of argument does not sit well when the Grievance involves an allegation that work was not performed as required – and no difficulties were reported to the Company by the Grievor regarding issues that day, leaving that non-performance to be later discovered. It does not lie with the Grievor to suggest she was not able to "recall" what work she performed 78 days previously when her lack of performance was left to be discovered at a later date. It was her *own* actions in suggesting she performed the work when I am satisfied she did not, that led to any delay and difficulties recalling what duties she performed that day.

[27] Where work is allegedly not performed, the Company can only Investigate what it becomes aware of. It did so in this case, and Investigated with the Grievor within the agreed timeline.

[28] If the Union is concerned with the time limits it has agreed to as impacting the memory of a grievor, the appropriate forum to address that issue would be at collective bargaining.

Question Number One: Was the Grievor Culpable for Falsifying Records?

[29] While the Grievor's evidence was she *thought* that the two Bays where she performed the work were Bay 9 and Bay 4 – she stated that perhaps she was confused, and that the second test was actually performed by her in either of Bays 8 or 10; and she then made a mistake in putting that information in "Raildocs", *as if* that testing were performed in Bay 9.

[30] The Union placed considerable reliance on this apparent "confusion" on the part of the Grievor as to which Bay she worked in, in its arguments, to explain the Grievor's entry into Raildocs.

[31] As Arbitrators are entitled to solicit evidence under CROA rules, this Arbitrator questioned whether there were batteries in Bays 8 and 10 that could have been tested by the Grievor by mistake, given the Grievor's explanation.

[32] I am satisfied from the evidence received to that question that neither Bay 8 nor Bay 10 of the MacDonald had any Batteries to test. The Grievor's explanation that perhaps she had performed the required test in one of *those* Bays *instead* of Bay 9 - and was simply confused when entering information into Raildocs about which number she tested - is therefore not found to be a reasonable or credible explanation.

[33] The Grievor had several other explanations for the disparity, which the Company has argued are irrelevant to the Grievor's responsibility to perform this testing.

[34] The Union noted the difficulties with working in the tunnel, including low light and debris; concerns with the time given to perform the work; the heaviness of the Bay doors; the buildup of coal dust on the doors of the Bays in the Tunnel; and even the lack of proper C02 masks. The Company has argued these explanations do not serve to mitigate the Grievor's responsibility to perform this work. I am drawn to the same conclusion.

[35] The Grievor sought and received TOP's for this work, and her evidence was that she waited for trains, in order to complete it. She spent all day at the Tunnel. The "downward pressure" to complete her work in a timely manner does not explain or excuse her failure to perform it *at all,* or why she did not have time to properly enter that work once she returned to her vehicle. Neither does the Grievor's evidence regarding the

buildup of coaldust on the Bay doors - or how heavy those doors are - explain her failure to perform the work she was assigned.

[36] It is the Grievor's responsibility to ensure she was in the appropriate Bay for which she was assigned work, even if that meant removing coal dust from the door so she could see the Bay number and confirm she was at the right place. That is not an onerous obligation. Whether or not she had the appropriate protective gear is also not relevant to her failure to perform that work. She did not advise the Company she was unable to perform her work for that reason.

[37] I agree with the Company that these explanations were attempts by the Grievor to deflect responsibility for her failure to perform her work, as opposed to mitigating factors for discipline and that such explanations – which are irrelevant and not credible as explanations for failure to perform that work - are in fact aggravating factors for discipline.

[38] The evidence has established the Grievor did not perform testing in Bay 9 in the MacDonald Tunnel on November 6, 2023 and falsified records to state that she did. I am further satisfied that that in doing so, the Grievor was aware that she had not performed two tests on November 6, 2023, and that her actions resulted in the falsification of important Company records.

[39] The culpability of the Grievor for falsifying Company records has been established on clear and cogent evidence.

Question Two: Was the Discipline Assessed "Just and Reasonable"?

[40] The second question in a *Re Wm. Scott* analysis requires an assessment of mitigating and aggravating factors.

[41] The Company was satisfied from its Investigation that the Grievor had not actually performed the requiring testing in Bay 9, but stated that she did. It dismissed the Grievor. The Company has argued this is a "culminating incident", if not a "stand alone" basis for dismissal. The Union has resisted that characterization.

[42] I am satisfied that the doctrine of "culminating incident" is captured and embedded in the well-established *Re Wm. Scott* framework. That framework requires consideration of all of the mitigating and aggravating factors – including the Grievor's discipline record

and the impact of jurisprudence - in determining an appropriate level of discipline. By assessing these factors, it can be the case that an event which justifies dismissal for one grievor would not result in the same discipline for another grievor, who is not similarly situated and does not have the same discipline record. That is the nature of the type of analysis under the *Re Wm. Scott* framework. That analysis subsumes the culminating incident doctrine, as it recognizes that such discrepancies can be just and reasonable.

[43] Whether it is called a "culminating incident" or an "assessment under the *Wm. Scott* framework", the analysis is the same: does this event support the discipline assessed?

[44] Upon consideration of the evidence, the jurisprudence and the aggravating and mitigating factors, the Company's response in this case was just and reasonable.

[45] Considering first the Grievor's disciplinary record, while the Grievor did not have active demerits on her file at the time of this incident, she had a significant disciplinary record, including a previous failure regarding her record keeping. The Grievor had 50 days of suspension, assessed between April of 22 and August of 2023, for two different MVA's. She also had a 45 day suspension in November of 2018 for placing her high-rail vehicle on the main track without authority, and failing to report that incident to a manager.

[46] In 2020, the Grievor received a formal reprimand for culpability for entering information into Raildocs "without actually performing" a "Wear Plate Test".

[47] That significant discipline record was appropriately considered by the Company as an aggravating factor for discipline.

[48] Discipline for not performing work is not an unusual event in this industry. However, several of the authorities relied upon by the Company involve more significant patterns of conduct than that of this Grievor.

[49] For example, in **AH638**, a Grievor of five years' service, with 20 demerits on his record engaged in a pattern of behaviour over two months of not performing work that he said he performed. It was found he had engaged in "month" of deception and dishonesty resulting in falsification of multiple records. His discharge was – not surprisingly – upheld, as it was found that "*the grievor was an employee with relatively few years of service*

whose misconduct can only be characterized as going to the heart of the employment relationship…" … "*cannot be reconciled with his continued employment with the Company*" (at p. 9).

[50] Likewise in **AH700,** involving an employee with 13 years of service, involved in 27 instances of falsification. Neither is AH716(B) comparable. That case involved a claim for time not worked. In that case, it was found the Grievor spent time at Walmart, Staples and home – and almost five hours driving around – but claimed for a full day's pay.

[51] There are two cases which have been helpful in this assessment. The first is **AH650,** where an employee with 2 years and 4 months of service - but a clean disciplinary record - failed to perform 5 tests over a 3 month period. As in this case, in **AH650**, the Union argued that a "mistake" was made, which did not convince the Arbitrator. The Arbitrator in that case noted that the Grievor's actions were "more than mere inadvertence" and found that a failure to perform a test – *and* also to then record it as if it had been performed - would be a "mistake" on *two* fronts and not just one. The Arbitrator was not convinced that those two mistakes had occurred.

[52] That same type of concern is also raised by the facts in this case: To fail to perform a test is one issue; to then input it as if it *had* been performed is another. Mistakes would need to be made on "two" fronts.

[53] The Union relied on **CROA 3614**, which involved careless time-keeping, which is not comparable.

[54] In **CROA 4858**, the Grievor had 14 years' seniority and had improperly released a clearance, leaving 7 cars on the main track. That case is also distinguishable as not being factually similar. Further, in that case, the Grievor's record had been changed between when the discipline was issued and when the hearing was held, due to recent decisions.

[55] The Union also filed **AH700** and **AH712**, as did the Company.

[56] **AH700** has already been addressed. **AH712** is the second case which is helpful to this analysis, and the strongest authority in terms of comparable discipline.

[57] In that case – as in this case - there was only one instance of a failure to perform a test. Like the grievor in that case, the Grievor in this case entered information into the "Raildocs" electronic system that indicated certain work was performed that was not. The Union argued an error in judgment and a distraction due to personal events, and that a "mistake" was made. Like in this case, explanations were also provided that were not found not to be credible (a lack of tools).

[58] In that case, while there was a last chance agreement which applied, the Arbitrator also held that *even without an LCA,* the result would have been the same:

> The Company also argued, in the alternative, that the Grievor's falsification of records was, in and of itself, a dismissible breach and constituted a culminating incident which, based on the Grievor's record, warranted dismissal. Unfortunately for the Grievor, I must agree. The Grievor' unenviable disciplinary record includes a previous suspension, in April 2018 [3 years before] for entering false Regulatory Testing into Raildocs without completing the tests. The Grievor was aware… of his responsibilities with respect to safety sensitive reporting. *Accordingly, even leaving aside my determination on the LCA aspect of this case, I would have concluded that his dismissal was warranted* (at p. 9, emphasis added).

[59] Considering all of the facts and circumstances in this dispute, including the importance of the tests to be performed by the Grievor; her explanations which were either not credible or not found to be relevant; and the fact that *two* situations were at play – first a failure to perform work *and* second falsifying a Company record; and given the Grievor's significant discipline record, unfortunately for this Grievor I have been drawn to the same conclusion as the Arbitrator in **AH712**.

[60] The Company's discipline of dismissal was just and reasonable in this case.

[61] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award. I also retain jurisdiction to correct any errors; and to address any omissions; to give it the intended effect.

Appreciation is offered to the parties and to the Grievor to the delay in issuing this Award, resulting from this Arbitrator's unusually heavy CROA caseload over the past several months.

DATED and **ISSUED** this 10th day of March 2025 at Wheatland County, Alberta

CHERYL YINGST BARTEL, B.A., L.L.B., L.L.M. (Lab. Rel. & Empl.)
ARBITRATOR

APPENDIX: EX PARTE STATEMENTS OF ISSUE

OF THE COMPANY

DISPUTE

The dismissal of S&C Flex Mobile Maintainer Nicole Ouston of Kamloops, BC.

STATEMENT OF ISSUE

Nicole Ouston was dismissed from Company Service for reasons as follows:

"A formal investigation was completed on January 23rd, 2024 in connection with "your tour of duty on November 6th, 2023, more specifically the regulatory testing which you allegedly performed and entered into the Raildocs system thereafter".

At the conclusion of your investigation, your culpability was established for falsification of regulatory testing as evidence by your entering 3-month circuit grounds and foreign voltage tests as being complete and compliant when you never actually performed these tests in Bay 9 of the Mount MacDonald tunnel, a violation of:

- Recommended Practice 1064 – Inspections and Tests
- Recommended Practice 1047 – Foreign AC Voltage Tests
- Recommended Practice 1008 – Circuit Grounds Tests
- Red Book Section 4.3.2 I and K – Circuit Grounds Tests and Foreign AC
- Red Book Section 3.2.0 - 3-month Circuit Grounds test and Foreign AC Voltage Test
- Recommended Practice 1003 - Batteries
- Rule Book For Engineering Employees 2.1 (b) – Reporting for Duty

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

COMPANY POSITION

The Company maintains that following the fair and impartial investigation, the Grievor was found culpable for the reasons outlined in her form 104. The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company maintains that the statement and evidence revealed that the Grievor did not perform regulatory testing that she entered as compliant. When the discrepancy was discovered, the Company investigated immediately. No objections regarding the validity of the evidence were raised during the investigation. The Company maintains the Grievor received orientation prior to working the territory. As an S&C Maintainer, performing regulatory testing is a mandatory requirement, and the duties are the same across the network.

For the foregoing reasons and those provided during the grievance procedure, the Company requests that the Arbitrator uphold the dismissal.

OF THE UNION

DISPUTE:

The dismissal of S&C Flex Mobile Maintainer Nicole Ouston of Kamloops, BC for alleged "falsification of regulatory testing as evidence by your entering 3-month circuit grounds and foreign voltage tests as being complete and compliant when you never actually performed these tests in Bay 9 of the Mount McDonal tunnel, a violation of:

- Recommended Practice 1064 – Inspections and Tests
- Recommended Practice 1047 – Foreign AC Voltage Tests
- Recommended Practice 1008 – Circuit Grounds Tests
- Red Book Section 4.3.2 I and K – Circuit Grounds Tests and Foreign AC
- Red Book Section 3.2.0 – 3 month Circuit Grounds test and Foreign AC Voltage Test
- Recommended Practice 1003 – Batteries
- Rule Book for Engineering Employees 2.1(b) – Reporting for Duty

UNION POSITION:

On January 23, 2024 S&C Flex Mobile Maintainer Nicole Ouston of Kamloops, BC was required to attend an investigation in connection with her "tour of duty on November 6, 2023, more specifically the regulatory testing which allegedly you performed and entered in the RailDOCS system thereafter".

Following the investigation, the Company terminated Ms. Ouston's employment.

It is the Union's position that the penalty of termination is excessive in all of the circumstances including the Grievor's years of service and record; the Company's delay in raising the allegations with Ms. Ouston and the Union; the reliability of the Company's evidence and the lack of particulars in relation to certain of the

allegations; and the failure of the Company to provide proper training and orientation.

As a result, the Union requests that Ms. Ouston be reinstated to her former position without loss of seniority, seniority rights, benefits, pension and that she be made whole for all lost earnings, with interest. In the alternative the Union requests that the penalty be mitigated as the arbitrator sees fit.

Further, the Union denies that the present incident constitutes “a culminating incident which warrants dismissal.”