AH899

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL NO. 11

(IBEW)

-and-

CANADIAN NATIONAL RAILWAY COMPANY

(CN)

Grievance Of Marc Machado – Discharge

Arbitrator: Graham J. Clarke
Date: March 31, 2025

Appearances:

IBEW:
R. Church: Legal Counsel
J. Sommer: Senior General Chairman
B. McCue: Regional Chairman CN – GLD
S. Martin: International Representative
M. Machado: Grievor

CN:
M. Boyer: Sr. Mgr. Labour Relations
C. Frémont: Director Labour Relations
J-B Gilbert: Sr. Mgr Signals & Communication

Arbitration held in Montreal on March 26, 2025.

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Award

BACKGROUND

1. On October 31, 2023, CN discharged Mr. Machado for, *inter alia*, irregular time reporting, unauthorized early departures and late starts of shifts.

2. The IBEW argued that Mr. Machado had not engaged in any intentional fraud or culpable wrongdoing and CN had no grounds to impose any discipline. In the alternative, the IBEW contended that CN imposed excessive discipline and failed to consider the mitigating circumstances. The IBEW also relied on the evidence that Mr. Machado's supervisor had condoned leaving work early yet CN had failed to respond to that evidence.

3. CN argued that it had previously disciplined Mr. Machado for actions including false time entries and that the multiple events leading to termination had irreparably broken the necessary bond of trust.

4. For the reasons which follow, the arbitrator has concluded that CN had just cause to discipline Mr. Machado.

5. While CN did not respond to Mr. Machado's allegation that he had an agreement with his supervisor about leaving early, that alleged agreement did not explain the many other incidents. Despite Mr. Machado's lengthy service, the arbitrator did not intervene to lessen the discipline due in part to a previous 90-day suspension imposed for similar incidents.

CHRONOLOGY OF EVENTS

6. The arbitrator will highlight some of the key dates/events arising from a thorough review of the parties' Record.

7. **June 29, 1988**: CN hired Mr. Machado. He had roughly 25 years of service at the time of his termination[1].

8. **2002**: Mr. Machado moved into an S&C Maintainer position which qualified him to construct, install, maintain, repair/renew any apparatus and perform electrical or other work.

9. **February 16, 2018**: CN suspended Mr. Machado for 90 days[2] for "Improper application of expenses and false time entries between February 2017 and February 7, 2018".

10. **February 8, 2023**: Mr. Machado's supervisor, Mr. Findlay, emailed[3] him saying "Please adjust your time accordingly for your dentist appointment on Jan. 30th". CN noted this email was not disciplinary and Mr. Machado had said he had made a mistake[4].

11. **March 9, 2023**: Mr. Machado's supervisor, Mr. Findlay, wrote him a letter[5] concerning his attendance:

> I have noticed that you have been leaving the property without notifying myself or the members of your SDU. March 9th is the day in question. I've already communicated the expectations for attendance, please abide by them here on out.

12. **May 15, 2023**: Mr. Findlay emailed[6] Mr. Machado about adjusting his time:

> Please adjust your time accordingly for the following days.
> Apr.18th messaged saying you wont be in until 10am
> Apr.27th messaged at 12:20 saying you're heading home
> May 1st messaged saying wont be in

13. **May 30, 2023**: Mr. Machado's headquarters changed to London, Ontario from Strathroy, ON where had had worked for the previous 15 years. Mr. Machado continued

[1] IBEW Brief, Paragraph 3; CN Brief, Paragraph 11.
[2] CN Documents, Tab 3 Discipline History.
[3] CN Documents, Tab 10.
[4] CN Brief, Paragraph 60.
[5] IBEW Documents, Tab 11.
[6] CN Documents, Tab 12.

to park his CN issued Hi-Rail vehicle at the Strathroy shop. The distance between Strathroy and London is roughly 50 kilometres[7].

14. **May 30, 2023**: Mr. Findlay emailed[8] Mr. Machado and others to remind them about their shift starting/finish times:

> Just as a reminder, the expectations for starting and finishing your shifts remains the same as it has been. You are expected to be on your own territories by the start of your shifts and remain on them until the end of your shifts…exception being if you are covering someone else's territory.

15. **October 12, 2023**: CN asked[9] Mr. Machado to attend an investigation to provide a Statement concerning the "circumstances surrounding your involvement in Alleged irregularities regarding your time keeping, reporting for duty and hours of service between June 1 - Sept 26, 2023".

16. **October 19, 2023**: CN's Investigating Officer (IO) conducted Mr. Machado's Statement[10] pursuant to article 13.4 of the collective agreement (CBA), with the latter's supervisor, Mr. Findlay, attending as an observer. The IBEW's Mr. Mueller appeared with Mr. Machado and posed certain questions at the end of the Statement. Some of the key Q&As included:

> 14. Q. Do you enter your own worked hours into the CN Payroll Management System commonly referred to as SAP?
>
> A. Yes
>
> …
>
> 20. Q. Where do you park your truck when it is not being used for work?
>
> A. Strathroy shop - 81 Metcalfe st W
>
> 21. Q. Is 81 Metcalfe st W Strathroy Ontario (Strathroy shop) on your current assigned territory?
>
> A. No
>
> 22. Q. Based on evidence "GPS map names" - would you agree that the Strathroy shop (81 Metcalfe st W) is 40 mins away from your current

[7] IBEW Documents, Tab 3.
[8] CN Documents, Tab 13.
[9] CN Documents, Tab 4, page 9/116.
[10] IBEW Documents, Tab 5.

headquarters (290 Hale st London Ontario) and the starting edge of your territory?

A. yes

23. Q. Why is your truck parked at 81 Metcalfe st and not taken home like most other on call employees?

A. Because I don't have the room

24. Q. Why is it not parked at your assigned headquarters?

A. I was under the assumption I was able to park it there. It was safe and I would be to my truck quickly for calls.

…

29. Q. When you input your overtime for a trouble call, do you add in the time from when you are called, to picking up your truck and the same thing after dropping it off at 81 Metcalfe st and using your personal vehicle to go home?

A. I start the time from the call and sometimes I pay myself until I am at home cleaned up and went to bed.

30. Q. Where do you normally start your day?

A. At the Strathroy shop, that's when I get into my truck

31. Q. Where do you normally end your day?

A. When I get out of my truck at the Strathroy shop

32. Q. As per evidence "start finish times" email, Did you receive this email from your Supervisor Scott Findlay on may 30 2023

A. Yes

33. Q. Why have you not been following your Supervisor's instructions?

A. I have been, it was talked about, if our jobs are being done and our tests are done, we were allowed to be home by end of shift.

34. Q. Who was that discussed with?

A. My Supervisor and other Maintainers

35. Q. Which Supervisor?

A. Scott Findlay

36. Q. When was discussion had?

A. I don't remember the exact date.

37. Q. Was there any emails or text messages proving this conversation happened?

A. no there was not.

38. Q. Do you understand the expectation explained in this email?

A. Yes I do

39. Q. Could you explain it in your own words

A. Stating our start times and finish times haven't changed.

40. Q. Is there any reference to territories in the email?

A. Yes there is,

41. Q. Could you explain what that means?

A. Talking about being on your own or covering someone else's territory

42. Q. Would you agree the email is referring to starting your shift on your territory and ending your shift on your territory?

A. Yes that's what it says.

43. Q. Is this the first time you have been told this expectation? When have you been told this in the past?

A. This email, and there was one I remember from the past.

44. Q. As per evidence "march coaching letter" Did you receive a coaching letter from your Supervisor Scott Findlay dated March 9th 2023?

A. Yes I did

45. Q. Please explain what the letter was referring to.

A. Not notifying my SDU I was taking the day off.

46. Q. In reference to the letter, did you let your Supervisor know you were taking the day off?

A. yes, Verbally

47. Q. Referring to evidence "time correction 1 and time correction 2" your Supervisor is asking you to adjust your hrs in SAP to reflect the hours you actually worked. Is that correct?

A. Yes that is correct

48. Q. These emails are sent to you after you inputted your time in SAP. Why did you have to make adjustments to your hrs in SAP if you input your time after you worked the hrs?

A. it was a mistake on my part.

49. Q. as per evidence "Advanced Detailed Trips Report + Hirail Status_20230928_134801" - June 1 You leave the Strathroy shop @ 10:39. You worked until 23:00 the night before. You are entitled to 8 hours rest. Why did you not leave the Strathroy shop until 10:39 and begin your 40 min commute to your assigned territory?

A. I was that tired. I slept through my alarm. I was on a call the night before.

50. Q. Did you inform your Supervisor that you would be late coming in?

A. no I did not

…

52. Q. June 6 you leave the Strathroy shop at 10:31 and begin your 40 min commute to your territory. (You finished the day at 23:04 the night before. You are entitled to 8 hrs rest.) You left your territory at 16:27 to travel back to Strathroy. You recorded 10hrs in SAP Please explain

A. I was out the night before. I am not accustomed to being called out as frequent.

53. Q. Did you make your Supervisor aware you'd be late

A. No i didn't

54. Q. June 8 - you leave your territory (Komoka on call territory) 16:42 to travel back to Strathroy. You recorded 10 hrs in SAP Please explain

A. I was done there and was going to finish out my day in Strathroy. Cleanout my truck

55. Q. June 14 - You leave Strathroy 06:35 to begin your 40 min commute. That puts you on your territory/shop 15 mins late. you leave the territory at 16:00 and travel back to Strathroy. You recorded 10 hrs in SAP. Please explain

A. I left early to look for more parts.

56. Q. Do you know why you were late arriving in the morning?

A. I was just late

…

59. Q. June 15 - you leave Strathroy @ 6:33 to begin your 40 min commute. Arrival time is 13 mins late to your territory/shop. You left your territory @ 16:50 to travel back to Strathroy. You recorded 10 in SAP. Please explain

A. I don't know why I left 10 mins early

60. Q. Do you know why you were late in the morning?

A. Late getting to my truck in the morning.

…

62. Q. June 19 - You leave your territory @ 16:21 to travel to back Strathroy. You recorded 10 hrs in SAP

A. It was because I was loading stuff into my truck or getting parts.

63. Q. Why was that not completed at your shop in London

A. I still have items from my truck in the Strathroy shop

…

68. Q. GPS shows you leaving your territory at 16:59 travelling to Strathroy. You recorded 10 hrs in SAP. Please explain

A. I made a mistake entering the time

69. Q. June 26 - you leave Strathroy @06:40 and commute 40 mins to your territory and arrive at your HQ 17 mins late. You arrive back at Strathroy @ 21:22. You recorded 10 hrs reg and 6 hr OT. Please explain

A. I spent time at the Strathroy shop. I got home @ 22:00 and after shower and supper 23:00.

70. Q. June 28 - You leave Strathroy 07:21 to travel into the beginning of your territory Shaw rd 60 mins late. You leave your territory @ 16:49 to travel back to Strathroy. You recorded 10 hrs in SAP Please explain

A. I slept in, I was tired I just left there was only 10 mins left of the day

…

72. Q. Your truck was parked at the Strathroy shop the entire time as per GPS report. The truck does not move from Jun 29 to July 11. You record 10 hrs reg and noon day meal on July 10. Please explain

A. That was a mistake.

73. Q. July 11 - You arrive at your HQ 7 mins late and you leave your territory @ 16:43 to travel to Strathroy. You recorded 10 hrs in SAP Please explain

A. I needed to go home to get a shower and a change of clothes.

…

76. Q. July 14 - you arrive at your HQ 12 mins late. You leave your territory @ 15:55. You get a call and leave the Strathroy shop @19:26 and arrive back at the shop at 22:45. You recorded 10 hrs reg and 5 hrs OT in SAP Please explain

A. I don't remember why I was late. I picked up cards at the tower in London and left to drop them off in Strathroy. OT - I had to get home, take a shower and my dinner. Then go to bed.

77. Q. July 17 - You leave the Strathroy shop @ 06:56 to travel 40 mins to your territory. You leave your HQ at 14:39 and travel back to Strathroy. You recorded 10 hrs reg and 1 hr OT in SAP Please explain

A. I slept in because I was up through the night to help with a trouble call. I left London early to go to Strathroy for grand master parts.

78. Q. July 18 - you leave Strathroy shop 08:41 to travel 40 mins to your territory. You arrive back at the Strathroy shop @ 19:49. You recorded 10 hrs reg and 3.5 hrs OT in SAP Please explain

A. Started at Strathroy shop, loaded up gate, lights and piers. I must've counted the hours wrong

79. Q. July 19 - you leave your territory @ 16:00 and travel back to Strathroy. You recorded 10 hrs in SAP Please explain

A. I didn't write it down, I must've been getting parts

…

81. Q. July 24 - CN 175088 remains stationary at the Strathroy shop. You recorded 10 hrs and a noon day meal in SAP. Please explain

A. That was a mistake, a mistake on my part

…

83. Q. July 28 - you arrive at your HQ 18 mins late. You recorded 10 hrs reg in SAP please explain

A. I was sick the day before. Had to use the facilities before I left.

84. Q. Did you make your Supervisor aware you'd be late

A. No I did not.

…

86. Q. aug 22 - you arrive at your HQ in London at 07:17. 17 mins late. You leave your territory 15:47 to travel back to Strathroy. you recorded 10 hrs in SAP Please explain

A. I was late because I was using the facilities at the Strathroy shop. I brought my truck in for service. Wheels need to be retorqued etc.

87. Q. Did you let your Supervisor know you'd be late?

A. no I did not

…

90. Q. Aug 29 - you arrived at your HQ in London @ 07:26. You left the territory and travelled back to Strathroy @16:45. You got a call and leave Strathroy shop @ 21:59 and return after completion @ 00:51. You recorded 10 hrs reg and 4.5 hrs OT + noon day meal and dinner. Please explain

A. in the morning, I was picking up gate parts at the Strathroy shop. I was done my testing and headed back under the assumption I could. called 21:30 got home at 02:00.

91. Q. What did you do from 00:51 to 02:00

A. I got showered, ate and went to bed

92. Q. You claim a dinner for this day but not entitled to it.

A. I thought I was entitled to it. I ate while I was out and when I was at home.

93. Q. Aug 30 - You leave the Strathroy shop @ 11:21 to begin your 40 min commute to your territory. You were out on a call until 00:51 that morning. You were entitled to 8 hrs rest. You left your territory to head home @16:36. You recorded 10 hrs in SAP Please explain

A. I was late getting in because I was tired. I left early because I was done and I was tired.

94. Q. Did you let your Supervisor know you'd be late and leaving early

A. I didn't because when I got back to Strathroy it was after 5

…

96. Q. Sept 7 - you leave Strathroy shop @ 06:42 to begin your 40 min commute to your territory. You left your HQ in London @ 14:39 to head home. You recorded 10 hrs in SAP Please explain

A. Slept in that day I went to the Strathroy shop, put back the bells and grabbed lag bolts and pins.

…

98. Q. Sept 8 - You arrive at your London HQ @ 05:45. you left the territory @ 13:52 to head home. You recorded 10 hrs in SAP Please explain

A. I started early I left to get rest

99. Q. Why would you pay yourself 10 hrs in SAP?

A. I had to change my shift to cover the welders but they ended up cancelling

100. Q. What were changing your shift to?

A. I was supposed to come in for 02:00.

101. Q. When did you find out it was cancelled?

A. Before the end of my day.

102. Q. Did you make up the time that you went home early?

A. no I did not.

…

104. Q. Sept 12 - you are off for the day, approved by Supervisor Scott Findlay You recorded 5.5 Hrs OT in SAP. CN 175088 does not move Please explain

A. My time entry should have been on the 11th and not the 12th.

105. Q. Sept 13 - you pick up your truck @ 06:45 to begin your 40 mins commute to your territory. You left your territory @ 17:35 to travel home. You recorded 10 hrs reg and 1.5 hrs OT in SAP. Please explain

A. I was in the bathroom at Strathroy shop. The OT is from a crossing call @ Elgin road at the end of my shift.

106. Q. Do you feel you are entitled to the OT for the travel to where you park your truck?

A. No, I get it. I never had it explained to me.

107. Q. Sept 14 - You leave your residence for a call @ 05:06. You leave your territory and travel to Strathroy @ 10:44. You recorded 10 hrs reg and 3.5 hrs OT in SAP Please explain

A. I must have miss counted the hours for the OT. I had to take the dog into the vet.

108. Q. Did you let your Supervisor know?

A. Yes,

109. Q. Do you have evidence of that communication?

A. no

110. Q. Why did you not adjust your time in SAP?

A. It was a mistake on my part. I didn't mean to do that.

111. Q. Sept 19 - You arrive at your HQ in London 07:24. 24 mins late You recorded 10 hrs in SAP please explain

A. I slept in, I don't have any other excuse.

…

113. Q. Sept 21 - you leave Strathroy shop @ 06:42 to commute 40 mins to your territory. 22 mins late You leave your territory @ 16:05 You recorded 10 hrs in SAP Please explain

A. I was waiting for Greg Long at the Strathroy shop to give a list to order. I had Drs appointment at 17:10.

114. Q. Did you let your Supervisor know you'd be leaving early

A. No, it was discussed before. it was ok to go home as long as stuff was done.

115. Q. Why did you not adjust your time in SAP?

A. I thought it was ok

116. Q. Sept - 25 You pick up your truck @ 06:47 and begin 40 min commute to London HQ. You are involved in a not at fault accident @ 07:20. Please explain your lateness

A. That day I was running behind. Is should've just called in.

117. Q. With all the examples of you being late and leaving early, Why would you pay yourself a full days pay when you did not work a full day?

A. Some were mistakes, wrong entries miscounting. I honestly thought it was ok to be back in Strathroy by 17:00.

…

119. Q. Would you say that you have been following your supervisor’s instructions to be on your own territory by the start of your shifts and remain on them until the end of your shifts?

A. Not after today The days I was doing things in the morning I didn't see myself as being late. The days I was parking my vehicle at end of shift, I didn't think there was anything wrong with that.

> 120. Q. Would you say that you have been following your supervisor's expectations communicated to you in the March 2023 coaching regarding attendance?
>
> A. My Supervisor doesn't know every time, no.

The IBEW also asked Mr. Machado some questions to conclude the Statement:

> 127. Q. Which other employees did your Supervisor allow to go home early if their work was done?
>
> A. Just Maintainers
>
> 128. Q. Do you know when that communication happened?
>
> A. This year,
>
> 129. Q. After May 30?
>
> A. Yes, I think
>
> (sic)

17. **October 31, 2023**: CN issued its Form 780[11], which indicated no active discipline and terminated Mr. Machado for:

> Irregular time reporting, unauthorized early departures and late starts of your shifts, and failure to properly perform duties of a SC Maintainer through the period of June 1 and September 26, 2023.

The Form 780 also described CN's policy on demerit points:

> Company policy provides that accumulation of sixty (60) demerit marks or more results in automatic dismissal from the Company service. Company policy also provides that 20 demerit marks are removed from the employee's record for every 12 consecutive months of active service free from discipline.

18. **October 31, 2023**: Mr. Machado's entire discipline history[12] contained 1 written reprimand, 40 demerit points, and 1 suspension. The demerit points had been removed over time due to Mr. Machado remaining discipline free.

[11] IBEW Documents, Tab 2.
[12] CN Documents, Tab 3.

19. **November 23, 2023**: In its Step 2 grievance[13], the IBEW grieved Mr. Machado's termination and noted:

> The Union does not dispute the facts of the case; however, the Union does feel that there are mitigating factors that should have resulted in a form of discipline less severe than discharge.
>
> …
>
> Machado's answers to questions 33, 34, and 35 stated he had a verbal understanding with his supervisor, Scott Findlay, regarding his ability to leave work early so long as his work was completed.
>
> …
>
> Supervisor Scott Findlay was present during Machado's investigation and could have provided a supplemental statement disputing Machado's assertion that he had a verbal understanding with his supervisor. However, the Company did not feel this additional step was necessary. The Union would like to remind the Company that it is the Company's burden to prove an employee's fault and provide all relative evidence. At best this shows a lack of due diligence on the part of the Company and at worst a prejudicial approach to the investigation. This is a violation of Article 13.4.

20. **May 3, 2024**: CN provided a lengthy Step 2 response[14] which noted, *inter alia*:

> That many instances of payroll irregularities over such a short period of time demonstrate Mr. Machado's clear lack of integrity. This is further proven by the fact that he was given multiple non-disciplinary opportunities to change his behavior (Supervisor Findlay's emails on February 8 and May 15 regarding his timesheet, a nondisciplinary coaching letter on March 9, as well as another email from Mr. Findlay reiterating the expectations on May 30), but he chose to disregard those.
>
> The fact that he paid himself in full while constantly arriving late and leaving work early, and even paid himself for entire days (as well as meals) on dates when he did not perform any work at all is not a "a mistake on his part", it's simply theft. Additionally, these actions were unbeknownst to his supervisor, demonstrating his deceptive and malicious intent, which is a significant contributing aggravating factor in the instant case.
>
> The Company would like to remind the Union that the grievor is a repeat offender when it comes to payroll irregularities. He was suspended without pay for 3 months in 2018 for: "improper application of expenses and false time

[13] IBEW Documents, Tab 6.
[14] CN Documents, Tab 6.

entries between February 2017 and February 7, 2018", which he confirmed himself during his investigation:

…

The Union's pretentions that he had a so-called agreement with his supervisor allowing him to leave work early, so long as his work was completed is totally false. As a reminder, Mr. Machado couldn't remember the date of this alleged discussion (question 36) nor produce any emails or text messages to prove his allegations (question 37) during his statement. The Company confirms that this was validated with supervisor Findlay before any disciplinary action was taken against the grievor. Additionally, the email sent by supervisor Findlay on May 30 refutes this and the expectations contained therein couldn't be clearer:

"You are expected to be on your own territories by the start of your shifts and remain on them until the end of your shifts…exception being if you are covering someone else's territory."

In response to the Union's pretention that Mr. Findlay was present during Mr. Machado's investigation and could have provided a supplemental statement, the Company reminds the IBEW that the Union representative who was present (Patrick Mueller) did not ask a single question to him. The Company's position is that Mr. Findlay was attending as an observer only and did the right thing by not intervening in the statement.

WHAT IS MR. MACHADO'S DISCIPLINE RECORD?

21. The IBEW alleged that CN's Form 780 showed that Mr. Machado had no active discipline, and that CN could not rely on any earlier disciplinary events to support its case for dismissal.

IBEW Position

22. In its Brief, the IBEW commented on CN's Form 780 in the Record:

> 4. The Grievor had no active discipline on his record at the time of his discharge. While the Union does not dispute that the Grievor was disciplined over five years prior for alleged "improper application of expenses and false time entries between February 2017 and February 7, 2018," the Grievor's discipline record must be viewed as a clean record, since even the Company's Form 780 discharge letter lists the Grievor as having no active discipline and no suspensions listed…
>
> 5. As the Arbitrator can respectfully see, the Company's own records do not list any active discipline (suspensions or otherwise) for the Grievor at the time of his discharge. For the purpose of this grievance, any prior discipline referenced by the Company should not be considered.

23. In its Reply, the IBEW again relied on CN's Form 780 to reiterate that Mr. Machado had no other discipline:

> 1. At paragraphs 22-25 and 67-71 of the Company's brief, the Company provides an overview of all of the discipline the Grievor has received during his 25-years of employment at the Company, none of which was active and able to be relied on by the Company. The Union respectfully reminds the Arbitrator of how Company records described the Grievor's record in the discharge Form 780
>
> …
>
> 2. The Union submits that replicating and relying on the Grievor's entire record, including nonactive discipline, is improper. If, as it appears, the Company relied on improper considerations like the Grievor's non-active record in deciding on discharge as the penalty, the propriety of the entire discipline process is called into question. As a result, the Union respectfully submits that in assessing the penalty of discharge in this case, the Arbitrator must consider the Grievor to be an employee with a clean discipline record, and should not and cannot rely on his prior discipline from more than 5 years prior.
>
> 3. Without prejudice to the argument above, to the extent that the prior record can or should be relied on, the Grievor's record shows a long service employee who has received only forty (40) demerits in his entire 25-year career with the Company, 15 demerits of which were for a car accident in 2007, and all of which he had worked off his record by 2023. His last corrective action prior to the discharge was over five years earlier. Overall, the Union submits that the Grievor has a good and relatively minimal record in the context of an entire 25-year career.

CN Position

24. In its Brief, CN described Mr. Machado's discipline history:

> 24. Over the course of more than 24 years of active service with the Company, the Grievor accumulated a total of 40 demerits, a written reprimand and a 3-month suspension in 2018 for a similar infraction related to "Improper application of expenses and false time entries between February 2017 and February 7, 2018".

25. In its Reply, CN argued it could rely on Mr. Machado's entire discipline history:

> 16 While the Union emphasizes that the Grievor had no active discipline at the time of discharge, the Union fails to acknowledge his lengthy discipline history of the same repeated violation since 2008 up to the latest incident prior to this incident where he was issued a suspension in 2018 for "Improper application of expenses and false time entries between February 2017 and February 2018".

> 17 A more accurate description of the Grievors discipline reflects that he had 1 written reprimand, 40 demerits and 1 suspension prior to his discharge. Of all 6 violations on his discipline history 4 relate to inaccurate time claims or leaving work early or arriving to work late.
>
> …
>
> 18 This prior violation is directly relevant because it establishes the Grievor was aware of the Company's policies but chose to engage in similar misconduct again.

Decision

26. In AH827[15], the arbitrator commented on the somewhat unique treatment of discipline records in the railway industry. These practices appear to arise from the historical use of the Brown System which imposes demerit points rather than suspensions. A total of 60 demerit points results in termination, but an employee's good behaviour can reduce those points (Footnotes omitted):

> 14. The parties addressed this issue during Mr. Brydge's arbitration. The important thing for any arbitrator is to avoid quick instinctive reactions coming from regular arbitration cases. The sophisticated parties in the railway industry have a different way of managing disciplinary records. The arbitrator must focus on the parties' practices. While some railways maintain a record of "active" and "total" discipline, the parties advised that that does not occur at CP.
>
> 15. Based on the parties' comments at the hearing and recent cases, the following non-exhaustive list of observations appear to apply to disciplinary records for TCRC members working at CP:
>
> > 1. The parties' collective agreement (CA) does not contain the type of sunset clause that arbitrators routinely see in regular arbitrations.
> >
> > 2. Historically, even though nothing has been reduced to writing in the CA, CP and the TCRC had adopted a practice which applied the Brown System of demerit points. Termination of employment would occur if an employee reached 60 demerit points. However, an employee who had 12 consecutive discipline free months would have 20 demerits deducted from the disciplinary record. Those notations remain on the disciplinary record.
> >
> > 3. Suspensions do not disappear from an employee's disciplinary record. The parties frequently cite in their Briefs an employee's overall disciplinary record, including demerit points and the various instances when discipline-free service resulted in a reduction of demerits. In CROA 4627, which involved a different railway, the arbitrator considered an

[15] *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2023 CanLII 25331

employee's demerit points reductions when intervening to modify the penalty:

> 13. Second, Mr. Norman's discipline record demonstrates that progressive discipline under the Brown System has worked in the past (U-2; TCRC Exhibits; Tab 5). He had 5 periods during his long career when demerit points were removed due to him going discipline free for over 12 months. One cannot refer only to specific discipline over a long career without also giving credit for these 12-month discipline-free periods.

…

27. In AH735[16], a case dealing specifically with CN but with a different bargaining agent, the arbitrator noted how historical discipline remained relevant (Footnotes omitted):

> 14. The parties use the "Brown System", which has a 60-demerit point threshold for termination, to add further precision to the concept of progressive discipline. The arbitrator commented on that system in CROA 4600:
>
> > 14. The parties follow the Brown System, which seeks to add additional clarity to the progressive discipline process. In CROA&DR 3592, Arbitrator Picher described the Brown System:
> >
> > > As stressed by the Company's representative, the case at hand truly tests the meaning of progressive discipline and the application of the Brown System. **That system is intended to give the employee, without the imposition of suspensions, a basis to understand the severity of any infractions which he or she may commit and the clear understanding of the vulnerability of his or her employment as the demerits on the employee's record accumulate towards the fatal total of sixty**.
> >
> > 15. The Brown System's use of demerit points provides progressive discipline guidance to employees, their trade unions, employers, as well as to CROA arbitrators. The latter group, of course, as in any progressive discipline system, retains the discretion to substitute a different penalty.
> >
> > (Emphasis added)
>
> 15. In some situations, the facts may persuade an arbitrator to substitute a suspension for the demerits which took an employee over the 60-point threshold:

[16] *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 6670

> 11. The arbitrator concludes that CN had grounds to discipline Mr. Norman for missing two calls without proper reason. However, the TCRC persuaded the arbitrator to intervene and substitute a suspension for the dismissal. There are several reasons for this.
>
> …
>
> 16. Given those circumstances, the arbitrator will remove the 20-demerit points CN imposed for the missed calls and substitute a 30-day suspension. CN can schedule the dates for this suspension based on current operational needs.

16. However, an employee's lengthy disciplinary record may lead to the opposite conclusion. In CROA 4600, the arbitrator commented:

> 30. Given Mr. Kettela's 49 demerit points and his previous suspensions, CN persuaded the arbitrator that the Brown System should apply as intended in this case. The Rule 42 violation, which was a serious offence, albeit unintentional, placed Mr. Kettela significantly beyond the 60 demerit points which the parties have agreed constitutes the threshold for termination.

17. For multiple reasons, CN urged the arbitrator not to intervene. Speeding always merits discipline but speeding with a Key Train constitutes an aggravating factor. Mr. Bashford's active discipline history already had 55 demerits when the May 29, 2021 Key Train speeding incident occurred. He had already been suspended in February 2021 for a different speeding incident while still sitting at 55 demerits.

18. CN noted Mr. Bashford's cumulative discipline history had 344 demerit points, 3 suspensions and 2 written reprimands, a record far worse than any other long service employee in the TCRC's bargaining unit.

19. The TCRC highlighted not only Mr. Bashford's 31 years of service, but also the fact that he did not attempt to deny his responsibility. He admitted his error in judgment since he thought he was further north and still had time to comply with the speed limits. Mr. Bashford also admitted he was "ashamed" that he missed the Key Train zone. In addition, the TCRC noted that 220 demerits of the 344 occurred over 10 years before the current incident.

(Emphasis from the original decision)

28. CN and the IBEW have previously followed this practice of referencing an employee's entire disciplinary record[17]. While CN did not explain why its Form 780

[17] See, for example, AH726-P - *International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company*, 2021 CanLII 41839

referred only to active discipline, that alone does not prevent it from referring to Mr. Machado's historical discipline record. Nonetheless, a reference to an employee's total demerit points must also indicate if the employee successfully had the points removed due to discipline free service.

29. If a party wants to change the longstanding Brown System and concurrent use of historical discipline, then this must be negotiated at the bargaining table.

THE IMPACT OF CN NOT PROVIDING REBUTTAL EVIDENCE

30. The parties had different views about their obligation to ensure the Record contained all the relevant evidence. The IBEW argued that CN's failure to rebut some of Mr. Machado's evidence given during his Statement constituted a fatal flaw in its case.

IBEW Position

31. In its Brief, the IBEW described CN's alleged failure to respond to Mr. Machado' evidence given during his Statement:

> 48. That evidence is lacking in this case. The Company did not submit any evidence in the investigation to rebut the Grievor's explanation that he had a verbal agreement with his Supervisor, even though the very same Supervisor was present at the investigation. If the Company disagreed with the Grievor's explanation, it was incumbent on it to produce evidence to support its position. This lack of evidence is a fatal flaw for the Company's case.
>
> …
>
> 50. The Union therefore submits that the Company has not met the standard of proof for discipline, and that the discharge should be overturned with full redress to the Grievor.
>
> 51. In the Union's view, this is not a case of deliberate theft: this is a case where the Grievor was following the same practices and understandings that have been in place for many years, with the full knowledge of his supervisor. In short, the Company condoned the Grievor's practices, by way of both tolerating any attending issues and by virtue of his agreement with Scott Findlay.

32. In its Reply, the IBEW reiterated why it believed that CN had failed to meet its burden of proof:

> 7. At para. 55 of its brief, the Company argues that the Grievor "did not provide any evidence to support his claim that his supervisor knew he was arriving late and leaving early." However, the Company bears the burden of proof to establish just cause for discipline, not the Grievor. In this case, the Grievor

provided his explanation for his timekeeping in the investigation. The Company did not provide any rebuttal evidence to the contrary, despite the fact that Scott Findlay, the Grievor's supervisor who is based out of the same office as the Grievor, was sitting in the room for the investigation listening to the very same answers.

8. Contrary to the Company's statement that the Grievor did not provide any evidence, the Grievor did in fact provide evidence to support his claim – his evidence was his testimony in the investigation, where he gave a clear answer that he and the other maintainers had an agreement with Scott Findlay that they could be home by the end of their shift, as long as they had completed their work. Nothing in the record of the investigation refutes the Grievor's evidence on this point. The Grievor confirmed in the investigation that these conversations with Scott Findlay took place after May 30, so after the May 30, 2023 e-mail (see Q&A 129 of Grievor's statement). Scott Findlay was in the room when the Grievor said this.

CN Position

33. In its Reply, CN provided a lengthy explanation about the alleged agreement:

9 The Union asserts that the Grievor had a verbal understanding with his supervisor, Scott Findlay, allowing early departures if his work was completed. However the Company disputes this claim, and there is no written or documented approval of such an arrangement, in fact there is only the opposite.

10 The Supervisor did not confirm this alleged agreement during the investigation. If such an agreement had existed, why was it not recorded or acknowledged by the Company? Additionally, it is not the time to intervene during an employees investigation. It was the Grievors time to provide his responses to the Company's questions.

11 Contrary to the Unions argument in paragraph 48-56, the evidence supports quite the opposite of the Unions false contentions. In February 2023, Supervisor Findley sent an email to the Grievor instructing him to adjust his time for January 30 as he included time he went to the dentist as part of his working hours.

12 In March of 2023, Supervisor Findley met with the Grievor and issued a coaching letter stating that he has been leaving the property without notifying him and that he has already communicated to the Grievor the attendance expectations.

13 Finally on May 15 and May 30th he sent 2 more communications to the Grievor in writing of the Company's expectations. If Supervisor Findley had allowed the Grievor to leave work early, why would he hold a meeting and provide a coaching letter with his expectations which are the opposite of what the Union is claiming was agreed to.

> 14 The Collective Agreement and company policies explicitly state timekeeping procedures, and employees do not have the discretion to create individual arrangements that violate these rules.
>
> 15 If such an agreement existed why was it not documented, only the opposite was documented, in fact if following numerous email communications and instructions from Supervisor Findley indicating Company's expectations, if the Grievor was unsure or as it states in paragraph 30 the Grievor had "assumptions" he could do this, he could have clarified the expectations with his Supervisor before misreporting his time however he did not because he had been coached, spoken to and discipline for this very topic several times and knew his actions if he was caught would have serious consequences. (sic)

Submissions at the hearing

34. At the hearing, CN relied on article 13.4(d) to argue that the IBEW had the obligation to ask Mr. Findlay, who had attended Mr. Machado's Statement, about the alleged agreement:

> 13.4
>
> (d) Where an employee so wishes, an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement. **The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement.** The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement and evidence which will be sent to the General Chairman electronically.
>
> (Emphasis added)

35. The IBEW countered that CN had the process backwards. The IBEW had no obligation to put in CN's evidence. The IBEW further noted that CN could have asked Mr. Findlay questions on the spot during Mr. Machado's Statement, or it could have conducted a supplemental investigation. Similarly, the IBEW noted that supervisors frequently provided written statements as part of the background material for a Statement, but CN did not do so in this case.

36. In short, the IBEW submitted that no evidence existed contradicting Mr. Machado's allegation that maintainers were allowed to go home once they had completed their work.

Analysis

37. The IBEW is correct that CN had the burden of proof to dispute Mr. Machado's evidence about an agreement.

Evidence in the railway model

38. The success of the railway model, which can hear multiple cases in a single day, relies entirely on the parties' cooperative effort to put the facts of each case into the Record. The later arbitration deals almost exclusively with legal argument, though exceptionally witnesses can testify.

39. In contrast, regular labour arbitration requires the party with the burden to lead its evidence through *viva voce* evidence, unless the parties have drafted a complete agreed statement of facts. The responding party, the union in a discipline case, then presents its evidence. Finally, the employer with the burden calls reply evidence to counter any union evidence with which it disagrees.

40. The railway model approximates that regular labour arbitration process. In a discipline case, the employer collects the evidence on which it will rely. That evidence must be produced to the employee as part of the CBA's interview statement process. After the employee's statement, the employer can decide whether to investigate further to provide evidence rebutting or clarifying that found in an employee's statement.

41. There is no obligation for the employer to respond to new items arising from an employee's CBA statement. But failing to respond to a crucial fact may well prevent it from meeting its burden of proof.

Cases examining the burden of proof

42. In AH664[18], a case involving these same parties, the arbitrator commented on CN's burden of proof in a discipline case, particularly if it disagreed with an employee's evidence:

> 15. CN bears the burden of proof in this discipline case. There is only one civil standard for the burden of proof which is on a balance of probabilities: CROA&DR 4500.
>
> …
>
> **29. Ultimately, based on the record, the arbitrator can only discern an implicit disagreement on CN's part regarding Mr. Reid's explanation of his**

[18] *Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11*, 2018 CanLII 52755

actions on June 26, 2017. In the face of these differing views, CN needed to demonstrate to the arbitrator why its position ought to be preferred.

30. As noted in CROA&DR 4603, it is not enough for an employer to reject an employee's explanation without presenting evidence or argument to support its position:

…

31. Similarly, in this case, CN evidently did not agree with Mr. Reid's explanation since it later terminated his employment. But, other than referring to various rules in its Form 780 and in its Brief, CN did not demonstrate why Mr. Reid's position must be rejected, and the discipline upheld.

…

37. There may be competing interpretations of these rules and how they applied to Mr. Reid, but none were put before the arbitrator. The arbitrator has no evidentiary basis on which to dismiss Mr. Reid's position out of hand. Even if there were other interpretations, there is a difference between an employee's innocent error and a flaunting of safety rules.

(Emphasis added)

43. More recently, the arbitrator examined a situation where CN, again in a dismissal case, did not add evidence to contradict key elements coming from an employee's statement. In AH837[19], a case involving these same parties, the arbitrator had to weigh an email alleging certain comments made by an employee and that employee's total denial of those comments in his CBA statement (Footnotes omitted):

2. CN relied on an email from a fellow employee, Mr. Lambert. That email had alleged that Mr. Moses, during a conversation about the federal election and the covid vaccination issue, had stated "If I have to hurt people, I will". The email further alleged that Mr. Moses stated that, if he took the vaccine, he would throw himself in front of a train at work.

3. During his investigation statement, Mr. Moses denied ever making these comments.

4. CN urged the arbitrator to accept the contents of Mr. Lambert's email and reject Mr. Moses' comments from his investigation statement. The IBEW argued that CN had failed to meet its burden of proof which required it to demonstrate that Mr. Moses had in fact made the statements which led to his dismissal.

[19] *International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company*, 2023 CanLII 99782

44. In AH837, the arbitrator described the railway model of arbitration's various mechanisms pursuant to which parties can resolve evidentiary conflicts (Footnotes omitted):

> 56. Railway cases have noted that various methods available to help resolve factual conflicts.
>
> 57. The first method is to take a statement from other individuals with relevant information. The parties' collective agreement contains protections for this important fact-finding exercise. For example, article 13.4(d) allows an employee and the IBEW to attend those statements:
>
> > d) Where an employee so wishes, an accredited representative may appear with him at the hearing. Prior to the commencement of the hearing, the employee will be provided with a copy of all of the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement. **The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement**. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement and evidence which will be sent to the General Chairman electronically.
> >
> > (Emphasis added)
>
> 58. Nothing prevented CN from having Mr. Lambert provide a statement which would have allowed the IBEW to ask questions.
>
> 59. A supplementary investigation can also help resolve contradictory facts [Footnotes omitted]:
>
> > 27. Disclosure by both parties at all stages forms an essential component of this expedited arbitration regime. A railway can also conduct a supplementary investigation should it need to clarify some answers.
>
> 60. In SHP563, Arbitrator Picher noted the importance of supplementary investigations and how they interacted with the collective agreement's time limits:
>
> > **The case at hand discloses a course of events in which the Company learned different information at various stages of the investigation process and, quite properly, made efforts to obtain information and to give the grievor the opportunity to respond to that information at**

> **a supplementary investigation**. Unfortunately, the truth emerged only from beneath successive layers of falsehood**. In essence, therefore, there was a single continuous investigation caused in no small measure by the grievor's initial failure to tell the truth, a fact evident from his own admission. In the circumstances the Arbitrator is satisfied that the Company did not violate the spirit or the letter of rule 28.3 by extending the investigation process. This is not a case in which the investigation process was prolonged arbitrarily or abusively for the purposes of a fishing expedition. On the contrary, at each step it was extended because of the nature of the information provided to the Company by the grievor himself.** In the result, the fifty-five demerits assessed against Mr. Harrison which issued on July 4, 2002 did come some twenty-three days after the conclusion of the investigation of his conduct surrounding the events of April 21, 2002. No violation of the provisions of rule 28.3 is disclosed in these circumstances.
>
> (Emphasis added)

61. Similarly, as noted in AH664, a case which involved these same parties, the railway model allows for oral testimony at the hearing to resolve key contradictions in the evidence:

> 26. As the arbitrator mentioned in passing during the hearing about various recent cases, it is challenging when new facts first come to light at an expedited arbitration. Article 13.19 of the parties' collective agreement seems to assume that the parties have fully discussed all relevant facts, especially if a Joint Conference (Article 13.8) has been held.
>
> 27. **Article 13.21 regarding the parties' right to present evidence seems to assume that any oral evidence will focus mainly on key contradictions. Otherwise, if the evidence presented raises new facts, then the parties might as well hold a traditional multi-day arbitration**. Similarly, raising potentially new grounds for discipline can be problematic in any expedited arbitration process: CROA&DR 4628.
>
> (Emphasis added)

(Emphasis from original decision)

45. Notably, AH837 examined the same article 13.4(d) on which CN relied at the hearing to suggest that the IBEW should have asked Mr. Findlay questions during Mr. Machado's Statement. For ease of reference, the key sentence in article 13.4(d) reads:

> The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding

> officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his involvement.

46. The proper interpretation of article 13.4(d) cannot shift the burden of proof. That article gives the IBEW and Mr. Machado the right to pose questions about the "evidence submitted" by CN. Since CN did not submit any evidence from Mr. Findlay, the IBEW had no opportunity to pose him questions about his evidence.

47. Article 13.4(d) does not oblige the IBEW to call additional evidence about any alleged agreement. CN had the burden to lead this evidence; the IBEW had the right to respond to it. In short, and with respect, the IBEW had no obligation to lead evidence with properly formed part of CN's case in chief or in reply.

48. In AH837, the arbitrator concluded that CN had failed to meet its burden of proof. An email, without more, cannot be preferred over an employee's statement which specifically denied ever uttering the words on which CN had based it decision to terminate (Footnotes omitted):

> 62. As noted in the introduction, CN did not meet its burden of proof in this case. It had the obligation to demonstrate, on a balance of probabilities, that Mr. Moses' had made the comments which led to his dismissal. Mr. Moses denied making them. **CN asked the arbitrator to discount his evidence taken pursuant to article 13.1 of the collective agreement and prefer Mr. Lambert's email.**
>
> 63. CN did not persuade the arbitrator to come to this conclusion. **On what basis can the arbitrator prefer an email over the evidence Mr. Moses gave during an investigation?**
>
> 64. **CN could have taken steps to resolve this crucial evidentiary conflict. As noted above, it could have required Mr. Lambert to provide a statement during the investigation. Another option involved conducting a supplementary investigation. In rare cases where credibility remains a lynchpin issue, the parties could agree to present oral evidence at the hearing**.
>
> 65. These methods would have provided the arbitrator with a full Record on which to resolve the crucial evidentiary conflict in this case.
>
> (Emphasis added)

49. This type of issue arose again in AH878[20], where the arbitrator had to consider whether "to prefer CPKC's position set out in its grievance responses over the other evidence in the Record, most notably Ms. Daniher's testimony on June 13, 2024" (para 45). The arbitrator preferred oral testimony over hearsay evidence:

> 53. The arbitrator cannot ignore Ms. Daniher's evidence and prefer the hearsay evidence in CPKC's grievance responses. Instead, the oral evidence confirmed that Mr. Daniher told her trainers about her ADHD and that, despite this notice, she had to write the Exam in the lab when others were present. CPKC did not provide her with the classroom she had used previously when she passed the first 3 exams.

50. Mr. Machado's case differs from AH837 since that case relied on a single crucial fact: did Mr. Moses say what CN alleged he had said. CN's only evidence consisted of an email. The person who sent the email neither provided a Statement nor testified at the hearing. The arbitrator preferred Mr. Moses' evidence obtained under the applicable CBA process.

51. The issue in the instant case is whether CN can still meet its burden of proof despite not addressing Mr. Machado's suggestion that Mr. Findlay allowed him and others to leave work earlier if he had completed all his work.

52. While CN did not provide any evidence to counter this specific comment made by Mr. Machado, it did rely on Mr. Findlay's contemporaneous written documentation which appeared inconsistent with an agreement.

53. In the next section, the arbitrator will consider whether CN's decision not to address Mr. Machado's allegation of an agreement prevented it from meeting the burden of proof in this case.

DID CN HAVE JUST CAUSE TO DISCIPLINE MR. MACHADO AND SHOULD THE ARBITRATOR INTERVENE TO MODIFY THE PENALTY?

CN Position

54. CN argued it had grounds to dismiss Mr. Machado for cause:

> 34. The Company maintains that, based on the evidence and the Grievor's own admissions during the official investigation, that he falsified his time sheets, that

[20] *International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway*, 2024 CanLII 57803

he claimed and was paid for time he was not entitled to, he falsified his SAP logs and included non-productive time, such as driving home and/or time spent at his home in his time claims for pay from May 30 to September 26, 2023 inclusively.

…

36. As per Article 5.1 of Agreement 11.1, an employee's paid time must start and end in their designated territory.

…

39. At Question 30-31 of the official investigation, the Grievor confirmed that when he was entering his time in the payroll system, his paid time started from the time he picked up his CN vehicle at 81 Metcalfe Street West in the Strathroy Sub, which is outside of his designated territory, to the time he parked his Company vehicle back at the same location.

…

47. First, the Grievor alleges that his supervisor allowed him to be home by the end of his shift. However, evidence demonstrates that his supervisor had instructed the Grievor on numerous occasions that employees are expected to be on their own territory by the start of their shift and remain until the end of their shift.

…

55. The Company simply does not believe the Grievor when he states his time theft was a product of mistake and/or inadvertence. The facts, or lack thereof, do not support his explanations. It is important to note that the Grievor did not provide any evidence to support his claim that his supervisor knew he was arriving late and leaving early. Additionally, the Grievor was warned, coached and disciplined numerous times previously regarding improper time entries. The Grievor's suggestion that he had an alleged agreement with a supervisor to appropriate non-worked time himself does not absolve him of culpability for his time theft. The Grievor is experienced, he knew the provisions of Agreement 11.1 and associated rules, and he deliberately chose to ignore same for his own personal benefit.

IBEW Position

55. The IBEW provided alternative arguments, as it is fully entitled to do, to support Mr. Machado's reinstatement:

> 43. The issue before the Arbitrator is whether there is just cause for discipline in the circumstances and, if so, whether discharge is justified. The Union's primary argument is that the Grievor's actions were condoned by his Supervisor and therefore there are no grounds for discipline.

> 44. In the alternative, the Union submits that the discharge issued to the Grievor is excessive given the allegations as applied to the case law, the principle of progressive discipline, and the Grievor's long service. The penalty of discharge should respectfully be mitigated in this case to something short of discharge.
>
> …
>
> 55. In the strict alternative, in the event that the Arbitrator finds that the Company did discharge its burden to prove just cause for some discipline, the Union submits that discharge is excessive, particularly as the Company failed to follow the principle of progressive discipline.
>
> 56. An increase from zero active discipline all the way to discharge is inherently punitive unless the facts alone justify an outright discharge, which the Union submits is not the case here. There simply was no progressive discipline here to give the Grievor a chance to correct the actual behaviour which led to the discipline – the entire purpose of the principle.

Law

56. CN and the IBEW provided helpful case law in support of their positions. Not surprisingly, all cases depend on their specific facts.

57. In AH836[21], the arbitrator recently examined an S&C Maintainer's multiple disciplinary measures. One of those measures involved "time theft".

58. As in the instant case, the parties in AH836 provided jurisprudence about the relevant legal principles (Footnotes omitted):

> 99. CPKC relied on CROA 4438 and AH722 to support the penalty of dismissal for time theft. In CROA 4438, Arbitrator Flynn wrote:
>
> > **In the present matter, the grievor admitted that she submitted fourteen unjustified wage claims from January 19 through February 5, 2015. She therefore committed fraud (theft). Theft constitutes a major employment offence and generally results in the discharge of the offending employee**. The Union contends that dismissal is not the appropriate measure because the grievor was suffering from a major depression at the time of the events and should be therefore accommodated. The Union also asserts that given the circumstances, her conduct is so aberrant that she cannot be held responsible.

[21] *International Brotherhood of Electrical Workers (System Council No. 11) v Canadian Pacific Kansas City Railway*, 2023 CanLII 73434

> I share, arbitrator Shime's analysis regarding employers rights to discipline an employee that committed a serious offense (theft) even when the employee is entitled to some rights (accommodation) under the Canadian Human Rights Act:…

100. In AH722, Arbitrator Hornung emphasized the importance of trust in an employer-employee relationship:

> 13. The time period over which the Grievor filed the false claims extended from September to December 2019. Unlike the circumstances discussed in AH 723, his actions were not an aberration related to a single incident or a single repetitive entry code related to the same work. The false claims were submitted by the Grievor, over a period of 3 months, on 13 separate occasions, using 9 separate codes. **The entries by the Grievor were not aberrations or unintentional entries which involved a lapse of judgment. Rather, the inescapable inference, given the number of claims made; the various codes which needed to be entered; and the manner in which they were done, over the time in question, is that the Grievor knowingly engaged in a scheme to increase his pay in a manner he knew, or reasonably should have known, was inconsistent with the Honour System and the Collective Agreement. Regrettably, I must conclude that his conduct was intentional and fraudulent.**
>
> 14. As such, the conduct of the Grievor was a form of theft (CROA 2669) which undermined the relationship of trust essential to the nature of the Grievor's job and warrants the most serious measure of discipline.

101. CPKC asked the arbitrator not to intervene and modify the dismissal it imposed.

(Emphasis added)

59. In AH836, the IBEW relied on different case law and asked the arbitrator to reinstate the employee (Footnotes omitted):

> 103. The IBEW also referred to cases where arbitrators intervened when the evidence showed carelessness rather than fraud. In CROA 3409, Arbitrator Picher noted that the employer had had a role in creating some confusion:
>
> > In the Arbitrator's view, when the facts of this case are considered in tandem with those reviewed in greater detail in CROA 3401, what emerges is an unfortunate lack of judgement of the part of both the grievor and his superintendent, Mr. Eric Blotzyl. At the outset, it was Mr. Blotzyl's ill considered proposal of a continuing employment contract which placed the grievor's status into what can fairly be characterized as a confused state during the events of May, 2003. **It is also significant that the**

grievor is an employee of relatively long service, being in his twentieth year of employment. There is nothing in his prior disciplinary record to suggest that he has been dishonest or reckless with the truth in his dealings with the Company.

104. As a result, Arbitrator Picher reduced the penalty due to the confusion:

> That is not to say that the grievor is without fault in the case at hand. Clearly he knew, or reasonably should have known, by the terms of the agreement of May 28, 2003 that he was not to be compensated for the period of his suspension. While I am satisfied that there was a genuine degree of confusion in the mind of the grievor as to the actual dates of that period of suspension and that he did not act out of dishonesty, the fact remains that he committed a serious error of judgement or carelessness, the nature of which was bound to cause the Company understandable concern as to his willingness to adhere to the terms of the agreement which he signed, if not to his good faith and honesty.
>
> In the result, **the Arbitrator is satisfied that by reason of the grievor's serious error in judgement, this is not an appropriate case for compensation. It is, however, an appropriate case for reinstatement, as I am satisfied that the Company has not established a basis upon which to claim that the bond of trust between the grievor and the Company is irrevocably broken**. On the contrary, no fraudulent intent on the part of the grievor is established on the evidence. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation and without loss of seniority, with his disciplinary record to stand again at the level of forty-five demerits.

(Emphasis added)

60. In AH836, the arbitrator concluded that the employer had met its burden of proof that it had grounds to discipline the employee, and that the arbitrator should not intervene to modify the penalty (Footnotes omitted):

> 106. **CPKC satisfied the arbitrator that it had grounds to discipline Mr. Bursey. CPKC further persuaded the arbitrator not to intervene to modify Mr. Bursey's dismissal**.
>
> 107. There are several reasons for this conclusion.
>
> 108. **First, CPKC satisfied the arbitrator, based on the applicable standard of a balance of probabilities, that it was more probable than not that Mr. Bursey knowingly submitted time claims which he knew were inaccurate. He had worked for CPKC for a long time and knew the process**.

109. Unlike in CROA 3409, supra, Mr. Bursey's submission of time claims did not result from some confusion to which CPKC had contributed in some way. Neither was it a momentary aberration. The evidence instead showed that Mr. Bursey entered incorrect time claims on multiple occasions.

110. Second, while the arbitrators cited above have highlighted the seriousness of fraudulent time claims, they still retained the discretion under s.60 of the Code to substitute a different penalty. The arbitrator has considered the IBEW's argument that Mr. Bursey had not had a history of lateness and erroneous time claims in the past.

111. However, the arbitrator cannot ignore Mr. Bursey's unenviable disciplinary record. As noted above, even after the arbitrator's significant reductions for the 2 suspensions reviewed earlier in this award, Mr. Bursey still had a 3-day suspension, a 10-day suspension and a mutually agreed 40-day suspension. While CPKC did not raise the LCA in support of this specific dismissal, Mr. Bursey clearly knew he was on thin ice due to his past behaviour.

112. **Notwithstanding his extremely precarious employment situation, Mr. Bursey, on multiple occasions, showed up late for work, used his CPKC vehicle for personal use and entered incorrect time claims into the SAP payroll system. This clearly broke the essential bond of trust that CPKC must have with its employees**.

113. **Third, while Mr. Bursey suggested that somehow his relationship with Mr. Shannik contributed to his actions, the Record contains no evidence suggesting that he filed any formal grievances or complaints. It is one thing to make allegations that you are not fully responsible for your actions, especially following a termination**.

114. **But it is another to prove those facts. Had complaints been made under applicable policies, or grievances filed, they might have provided mitigating facts an arbitrator could weigh. The Record does not contain those facts**.

115. For the above reasons, the arbitrator dismisses Mr. Bursey's grievance contesting his dismissal for, inter alia, time theft.

(Emphasis added)

Decision

Did CN have cause to discipline Mr. Machado?

61. As noted earlier, CN took a risk by not responding to some of the allegations Mr. Machado put in the Record during his Statement.

62. The main allegation from Mr. Machado was that, despite the May 30, 2023 email from Mr. Findlay, he did not follow it because "I have been, it was talked about, if our jobs are being done and our tests are done, we were allowed to go home by end of shift" (QA33). In the JSI, the IBEW described this practice and its implications:

> The Grievor's supervisor condoned the Grievor's actions with respect to his attendance. In particular, Machado had a verbal understanding with his supervisor permitting him to leave work early so long as his work was completed.

63. The arbitrator described above various ways parties can ensure the Record contains all the evidence they want a decision maker to consider when drafting the required fully motivated decision.

64. The arbitrator has concluded that CN had sufficient grounds to discipline Mr. Machado. Even considering the IBEW's condonation argument about leaving work early, that position cannot excuse all of Mr. Machado's conduct.

65. While CN did not lead rebuttal evidence about an alleged agreement, the Record, as summarized above in the Chronology, still contained multiple examples of Mr. Findlay making his expectations clear to Mr. Machado regarding attendance and time keeping:

- February 8, 2023: In a non-disciplinary context, Mr. Findlay had asked Mr. Machado to correct time for a dentist appointment, something which Mr. Machado had allegedly described as a mistake.

- On March 9, 2023, Mr. Findlay advised Mr. Machado of attendance expectations "I have noticed that you have been leaving the property without notifying myself or the members of your SDU. March 9th is the day in question. I've already communicated the expectations for attendance, please abide by them here on out." (QA44-46);

- On May 15, 2023, Mr. Findlay asked Mr. Machado to change 3 separate time entries he had made;

- On May 30, 2023, Mr. Findlay advised employees that their time started and ended when they arrived and left their territory. Strathroy, where Mr. Machado parked his truck, was 40 minutes away from his territory;

- In his Statement, Mr. Machado acknowledged what the May 30 email said (QA42) and that CN had communicated this expectation before (QA43);

66. It would have been helpful if CN had led evidence to explain the seemingly contradictory evidence between the alleged agreement and Mr. Findlay's written documentation. However, unlike in AH664 and AH837, *supra*, that procedural choice did not prevent CN from meeting its burden of proof in this case.

67. The arbitrator has considered Mr. Machado's evidence that he had an agreement with Mr. Findlay to leave early if his work was done. But that alleged agreement still does not address or excuse the repeated and troubling events summarized in the above Chronology:

- Strathroy: Mr. Findlay did not authorize Mr. Machado to use travel to/from Strathroy, rather than his assigned territory, for time keeping purposes;

- Pay/Overtime: Mr. Machado claimed pay/overtime from when he received the call in Strathroy and included time, for example, "until I am at home cleaned up and went to bed" (QAs 29; 69; 76; 90-91; 105-106);

- Start/end of day: Mr. Machado started and ended his day when he got into and out of his truck in Strathroy (QA30-31);

- Time entry mistakes: Mr. Machado claimed that he had made mistakes in multiple time entries, all of which resulted in better income for him (QAs 48; 68; 78; 98-102; 104; 107-110; 111;);

- Late arrival/failure to advise supervisor: Mr. Machado frequently arrived late for work in his territory and often failed to advise his supervisor despite clear instructions to do so (QAs 52-53; 56-60; 70; 83-84; 86-87; 93-94; 113-115; 116-117; 120)

- Improper wage claims: Mr. Machado made i) a wage claim for July 10, 2023, a date on which he was still on vacation (QA72); ii) an inaccurate claim, when back at work on July 11, which included showering time (QA 73); and iii) a claim for 10 hours worked and a meal on July 24 despite his truck remaining stationary the whole day (QA81).

68. Unlike in other cases, such as CROA 3409, where there had been a simple error or misunderstanding, the Record demonstrates a constant pattern of lateness, charging for Strathroy commute time, claiming time for showering at home, making "mistakes" in the work hours claimed and claiming remuneration for time never worked.

69. Mr. Machado also did not advise Mr. Findlay when he left work despite clear instructions to do so. This evidently limited CN's ability to manage or investigate his time claims. Conversely, as shown by the May 15 note, when Mr. Findlay received these

notifications from Mr. Machado, he was able to ask Mr. Machado to correct his SAP time entries[22].

70. These facts cause Mr. Machado's case to fall within those like AH722, *supra*, where Arbitrator Hornung commented:

> The entries by the Grievor were not aberrations or unintentional entries which involved a lapse of judgment. Rather, the inescapable inference, given the number of claims made; the various codes which needed to be entered; and the manner in which they were done, over the time in question, is that the Grievor knowingly engaged in a scheme to increase his pay in a manner he knew, or reasonably should have known, was inconsistent with the Honour System and the Collective Agreement.

71. Similarly, the arbitrator's conclusion in AH836, *supra*, would also apply:

> 112. Notwithstanding his extremely precarious employment situation, Mr. Bursey, on multiple occasions, showed up late for work, used his CPKC vehicle for personal use and entered incorrect time claims into the SAP payroll system. This clearly broke the essential bond of trust that CPKC must have with its employees.

Should the arbitrator modify the penalty of dismissal?

72. Given the above facts, the IBEW did not convince the arbitrator to modify Mr. Machado's dismissal.

73. In many railway arbitrations, both parties rely on an employee's historical disciplinary record. This is not the first time Mr. Machado has had these issues. CN previously suspended him for 90 days for "Improper application of expenses and false time entries between February 2017 and February 7, 2018".

74. Even if one were to assume that progressive discipline applied to cases involving "time theft", something which the above cases like CROA 4438 may not support, the arbitrator cannot ignore that CN has already disciplined Mr. Machado for similar conduct.

75. The Record clearly confirmed that Mr. Machado has repeatedly breached the essential bond of trust he had with CN. This is especially the case, as in AH722, given that he worked independently and entered his time based on the honour system.

[22] CN Documents, Tab 12.

76. In such circumstances, the arbitrator will not exercise the authority granted under the *Code*[23] to substitute a lesser penalty than the dismissal CN considered justified.

DISPOSITION

77. For the foregoing reasons, the arbitrator dismisses the grievance.

SIGNED at Ottawa this 31st day of March 2025.

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Graham J. Clarke
Arbitrator

[23] *Canada Labour Code*, RSC 1985, c L-2 at section 60(2).