CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5106

Heard in Edmonton, November 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 demerits and subsequent dismissal issued to Conductor S. Reed of Calgary, AB.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Reed was assessed 30 demerits August 17, 2023 for the following: *"In connection with your missed call on Saturday, July 15, 2023 at 0747 for TCS 8285 while working as a Conductor in Alyth Yard; a violation of the T&E Availability Standard."* Mr. Reed was dismissed on the same date for the following:

"Please be advised that in light of your 30 Demerits assessment of discipline, you are hereby DISMISSED from Company service for an accumulation of 60 demerits under the Hybrid Discipline and Accountability Guidelines."

UNION POSITION

The Union contends the Company's late response to the Step Two appeal is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union contends the discipline assessed is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors evident in this matter as outlined in the grievances. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union disputes any reference to the Company's Discipline Policy, and the manner in which it has been applied in the instant matter.

The Union disputes the application of the T&E Availability Standards Canada policy.

The Union requests that the discipline be removed in its entirety, and that Mr. Reed be reinstated without loss of seniority and benefits and be made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Union suggests the Company has effectively failed to respond to the Step 2 grievance within the mandatory time limits and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. The second step appeal was responded and uploaded on the Grievance Management System on April 25, 2024. Accordingly, while the Company cannot agree with the Union's allegations pertaining to the Step 2 grievance response, the Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. It is clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure.

The Company maintains the burden of proof has been met and that the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union.

The Grievor understands that missing calls is a violation of the Company's T&E Availability Standards and is responsible to ensure he is available when subject to duty. The railway is a 24/7 operation and as a conductor, has a responsibility and contractual obligation to be available and to report for duty when not on personal rest. This is highlighted to all employees from their hiring date. The Company's maintains the assessment of discipline is in line with the Hybrid Policy and followed the principles of progressive discipline.

Based on the foregoing, the Company can see no violation of the Collective Agreement, or any other provisions and maintains the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

For the Union:	**For the Company:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chairman CTY-W	Director, Labour Relations

There appeared on behalf of the Company:

A. Harrison	– Manager, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary
A. Birdsell	– Manager, Health Services, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
J. Hnatiuk	– Vice General Chair, Calgary
M. Nilsson	– Local Chair, Calgary
S. Reed	– Grievor, Calgary

AWARD OF THE ARBITRATOR

Analysis and Decision

Facts & Issue

[1] The Grievor was employed as a Conductor. At the time of this offence, he had approximately 2.5 years of service. On July 15, 2023, the Grievor was assessed 30 demerits for missing a call at Alyth Yard in Calgary. On that same day, he was dismissed for accumulation of demerits.

[2] The Grievor acknowledged he missed a call. He also acknowledged being off work for five days before the telephone calls were made calling him to work.

[3] The Grievor's explanation was that his expected train "fell back" by 7-8 hours, and that he was now expecting a call at 2300. That was determined by him when he checked at 0400 and so the Grievor decided to return to bed and "take a nap".

[4] The Grievor's evidence was he was sleeping "nights" and up "days" while waiting for his call.

[5] The Grievor did not hear the four calls which were made between 0725 and 0747 EST (0525 and 0547 MST Calgary time) that morning, to call him to work. When asked when he realized he had missed a call for work, he answered "I don't know". I do not find that evidence credible or compelling. His call to the Company was made at 0955 and I am satisfied that is when he woke up and realized he had missed a call to work.

[6] The issues between the parties are:

a. Was the Grievor culpable?

b. If so, was the discipline assessed just and reasonable? and, if not

c. What other discipline should be substituted?

[7] For the reasons which follow, the Grievance is upheld, in part. The Grievor is culpable for missing this call, but the imposition of 30 demerits was not a just and reasonable disciplinary response. Discipline of 15 demerits is substituted.

Arguments

[8] The Company maintained it had just cause to assess the Grievor 30 demerits which led to his dismissal for accumulation, under its disciplinary policy and as reasonable in all of the circumstances. It argued that missed calls had impact on its operations and on the morale of other employees who are called when they did not anticipate they would be scheduled, because another employee has missed his or her call. It pointed out the Grievor had not been called for 5 days prior to his call, meaning he had "plenty of opportunity to be fit and rested for his call" (at para. 24). He was called 3 times by the automated calling service and also once personally by the Crew dispatcher.

[9] The Company argued the discipline was assessed after consideration of all of the factors, and as per its disciplinary policy (currently under grievance) including that the Grievor had amassed four previous discipline assessments, including one Major Life-threatening offence, and that his employment was precarious as a result. It pointed out he had received 20 demerits and a warning letter for failure to validate the position of switch points, and a further 20 day suspension for failing to properly secure equipment, prior to this missed call. The Company also argued the Grievor offered no meaningful reason for needing a nap and not being available for his call and that he did not intend to report to work that day. It also distinguished the Union's authorities.

[10] The Union argued there was no culpable wrongdoing on the Grievor's part and that no discipline should issue.

[11] The Union argued the Grievor has no pattern of such behaviour and he inadvertently missed this call as he took a nap when the line up had fallen back 7-8 hours. It argued his explanation was credible and that the Company cannot base its discipline on speculation, but on clear and cogent evidence.

[12] In the alternative, even if the Grievor's conduct was culpable, the Union argued the Company is unable to meet its burden to establish that the discipline of 30 demerits was just and reasonable in all of the circumstances, including that this was the Grievor's first missed call. It argued that discipline was in fact unjustified and excessive. It noted that 30 demerits is a penalty which is severe and "starkly contrary" to the principles of progressive discipline. It argued the Company was unable to establish any intentional

wrongdoing justifying such a severe penalty. It also argued neither the Grievor's record nor the circumstances supported such a severe penalty. It argued the Grievor was entitled to rely on the line-up and the Company did not dispute that line-up had changed. It also argued it was not possible to maintain a constant state of readiness over the course of 5 days, as the Grievor had been subject to call for that period. It was the Union's position the Company had not provided any evidence of prejudice or impact. It also distinguished the Company's jurisprudence. It pointed out the first two incidents of discipline on the Grievor's record were AOR, which cannot be grieved.

Decision

[13] The railway is a 24/7 operation. As noted in **CROA 4627**, it is not a "9 to 5" job.

[14] As explained by the Company, employees who occupy positions on a board are called in their order of position, and are "required to be available for work when called for service" (at para. 21). The Company explained that when that service might be required was dependent on several variables, including the needs of customers and the flow of traffic across its network. It pointed out that this ability to dynamically schedule allowed the Company to efficiently use its labour, while still meeting the needs of its customers. The Company argued missed calls then caused a "ripple effect", affecting other Conductors on the spare board by "significantly changing their anticipated call times" (at para. 23).

[15] In this case, the Grievor would have reported to work in Calgary, taken a taxi to Red Deer to take over a waiting train, and then operated that Train back to Calgary, as there was no one in Red Deer to pick up the Train. When the Grievor failed to take the call, the next person on the board would be called for that Train, and may have to take a short call for duty.

[16] As noted in **CROA 5054** and **5056**, when not on personal rest, employees have an obligation to report to work when called. It is the nature of this business that they may not have certainty of when that call may come. While watching line-ups is one way individuals can assess when they might be called, it is not a fool-proof method.

[17] It is also the case that the Company may have its own concerns of why a Grievor did not report to work, but discipline cannot be based on speculation. That said, arbitrators are united that patterns of behaviour (such as missing calls before weekends, or EDO's or vacations) is a relevant factor in determining whether a concern is speculative or not. Explanations given by a Grievor is also relevant evidence to be weighed.

[18] Discipline must be contextual and proportional. Each case is dependent on the facts and circumstances, including such factors as length of service and disciplinary record.

[19] In this case and for the following reasons, I agree with the Company that culpability for missing work has been established. It is relevant that the Grievor had *already* been subject to 5 days without work and therefore had ample opportunity to be rested when he was called to work. This is not a case where a Grievor already worked 30 hours in three days and his or her level of fatigue could offer some explanation of why a call was "slept through". It is also relevant that in this case, the calls were not made in the middle of the night but came between 0525 and 0547 in the morning, at a point in time when the Grievor – whose evidence was he had been sleeping as if working "days" – should have been waking up anyways.

[20] It is therefore curious that the Grievor would not have woken at that time of day with four calls made. The Grievor's evidence was he was up at 0400 and realized the train line-up had fallen back, so went back to sleep for a "nap". I am prepared to find that the Grievor did not in fact wake up until 0955 and that he attempted to conceal that information by saying he "did not know" when he woke up, during the interview. There was no explanation offered for why the Grievor would need to sleep until so late after a previous five days off work and I agree with the Company that it is curious that the Grievor also slept deeply enough during that "nap" that he could not be woken by four phone calls less than two hours later. Given he slept until almost 10 a.m., he returned to bed without setting an alarm for another check of his expected work. Returning to bed without setting an alarm was a poor choice.

[21] I also agree with the Company that the Grievor's own evidence demonstrated an unexpected nonchalance at the fact he missed work. The Company argued the Grievor's

justification was “nonchalant” and I agree the Grievor’s answer of “I don’t know” when asked when he realized he had missed a call was unusual. He offered no explanation for why he could not recall when he woke up. As noted above, I am prepared to conclude he did not wake up until almost 1000.

[22] These facts distinguish this case from the facts in **CROA 5056**, relied on the Union.

[23] Turning to the second question in a *Re Wm. Scott* framework, while I agree with the Company that the Grievor was culpable for some level of discipline when he missed his call, given these particular circumstances, I agree with the Union that the imposition of 30 demerits for this offence was not proportional and therefore cannot stand as just and reasonable.

[24] The penalty of 30 demerits under the Brown System takes an employee half way to dismissal. It is a significant and severe penalty. While discipline is to be “progressive”, the ultimate goal cannot be lost in marching a Grievor along a disciplinary path.

[25] In this case, the level of discipline appears to have resulted from the Company considering that the Grievor had reached a certain level under its own policy due to his record, (with 30 demerits being the “next step”), rather than from its assessment of *all* of the facts and circumstances, as is required. Reviewing the jurisprudence, for significant discipline such as 30 demerits to be reasonable, arbitrators expect to see a pattern of behaviour of missed calls, a pattern of absenteeism, or a pattern of “cherry picking” assignments by failing to respond to calls for work, which justify the Company looking upon that behaviour as part of a larger and concerning pattern of behaviour. However, this Grievor did not have these types of patterns.

[26] While the Grievor does have a 20 day suspension for failing to properly secure a cut of cars, resulting in a roll-out seven months before, missing a call does not carry with it the same safety implications.

[27] While the Company argued the Grievor “had no intention to work that day”, sleeping through a call does not necessarily lead to that conclusion, although I accept that the Grievor made a poor choice in going back to sleep and in being tired enough – for whatever reason – to sleep through four calls a short time later. He was also not

forthcoming on when he woke up during his Investigative interview. As an individual who had missed a call for work in an industry where he is required to be available, the Grievor was not apologetic or remorseful. Remorse – or lack of it – is a relevant factor in determining the appropriate level of discipline. That is leads to a reasonable concern the Grievor may not understand the importance of being available to the Company.

[28] The Grievor's length of service is not particularly mitigating.

[29] In this case, the Company argued the Grievor demonstrated disregard for the Company's rules, given his disciplinary record.

[30] That is a statement often seen at CROA and it can overstate the case. A Grievor's disciplinary record – while relevant – is only one factor and is not – by itself – determinative.

[31] In **CROA 3381**, relied upon by the Company, a pattern of missed calls during a short period of time supported significant demerits. The arbitrator in that case determined the grievor "had little or no conception of the meaning of availability and service" and had been "unavailable" due to missed calls 66% of the occasions he was called. The same cannot be said of this Grievor.

[32] Recidivism was also significant in **CROA 3639** and **3190**, referred to in Arbitrator Hodges Award between these parties of August 29, 2023 (un-numbered), also relied upon by the Company. In Arbitrator Hodges decision, the Grievor had "previous discipline for an attendance issue" (at p. 5). Arbitrator Hodges found 30 demerits to be excessive, even with this previous discipline and substituted time out of service.

[33] In **CROA 4642** the Grievor likewise had discipline imposed for three different missed calls, and it was these prior missed calls that the arbitrator held should have put the grievor on notice to make sure he could be reached. The grievor in that case had been assessed 25 demerits. The "backdrop of similar issues and clear warnings" was relevant (at p. 7). The 25 demerits were set aside and the grievor's termination replaced with a "time served" suspension, without compensation.

[34] In **CROA 4701**, the Grievor had multiple issues relating to booking unfit and missing calls, as well as refusing to comply with instructions. That is not only

distinguishable from the facts in this case, but also supports a penalty which is less severe than the 30 demerits this Grievor received.

[35] The Company also relied on **CROA 4673**, where a Grievor with 6.5 years of service had missed a call, was assessed 20 demerits and discharged due to accumulation. In that case, the Grievor had accumulated 45 demerits, four written reprimands and three suspensions and had been on "Last Chance Agreement" for four months when he did not accept a call and booked himself unfit and was assessed 20 demerits. That is also distinguishable from these facts.

[36] In this case, there has been no "repeated" excuse of cell phone failure; no pattern of missed calls; the Grievor did not have an abysmal record, nor was he on a Last Chance Agreement.

[37] On its own authorities, the Company's assessment of 30 demerits is not supported as just nor reasonable for this one missed call.

[38] As the second question in a *Re Wm. Scott & Co.* framework has been answered positively, that raises the third question, which is what discipline should be substituted as just and reasonable, through an exercise of this arbitrator's discretion?

[39] The Union relied on several authorities. I have reviewed that jurisprudence. Like the Company's jurisprudence, the Union's authorities also recognize that responding to calls is an important aspect of working in this industry. **CROA 4524** is a case where a "weekend pattern of abuse" was alleged. That is not the case in this Grievance. The Union also relied on **CROA 4631**, but that case is distinguishable raising issue with certain wording regarding the spare board. **CROA 3190**, also relied upon by the Union, has already been addressed, above. **CROA 4627** involved an engineer with more than three decades of service. That is distinguishable from this Grievor.

[40] **AH792** involved discipline for several different events, one of which was a missed call which had been assessed 25 demerits. I find that to be the closest fact situation to the current situation. The arbitrator substituted 15 demerits for the 25 demerits issued for a missed call/late arrival.

[41] I am prepared to exercise my discretion to vacate the discipline of 30 demerits and to substitute 15 demerits as a just and reasonable disciplinary response, in these circumstances.

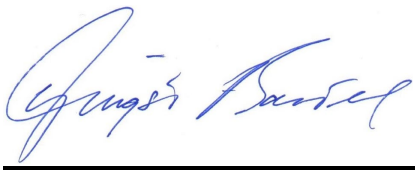
Conclusion

[42] The Grievor is upheld. The assessment of 30 demerits is to be vacated. 15 demerits are to be substituted as a just and reasonable disciplinary response.

[43] As 15 demerits does not result in dismissal for accumulation, the Grievor is to be reinstated and made whole for all losses related to his termination for accumulation. The matter of the amount owing to the Grievor is returned to the parties, who are usually able to agree on such amounts.

[44] However, should the parties not be able to agree, either party can apply to have that matter brought before a CROA session at which I preside, upon notice to the other party. That issue will be determined on a stand-alone basis at that CROA session. The CROA Office is directed to schedule that issue on a priority basis, should it be required.

I remain seized with jurisdiction over remedy to make any such determination that may be required. I also remain seized for any questions relating to the implementation of this Award; to correct any errors; and to address any omissions, to give this Award its intended effect.



February 21, 2025

CHERYL YINGST BARTEL
ARBITRATOR