CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5108

Heard in Edmonton, November 14, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 10-day suspension (5-day suspension and 5 days deferred suspension) assessed to Conductor, S. Sterling.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Grievor was assessed discipline as shown in his Form 104 as follows; "Formal investigation was issued to you in connection with the occurrence outlined below:

"Running through the EW08 East-end switch in Smiths Falls yard April 24, 2023 while working G65-24."

Formal investigation was conducted on May 4, 2023 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation, it was determined the investigation record as a whole contained substantial evidence that you violated the following:

- Rule Book for T&E Employees – Section 9.1

In consideration of the decision stated above, you are hereby assessed a ten (10) Day Suspension, five (5) days suspension and five (5) days deferred suspension.

Your five (5) day suspension will commence on Sunday, May 21, 2023 at 00:01 and end Thursday May 25, 2023 at 23:59.

In the event that you have any incidents within six months of the issuance of this letter, the discipline noted herein may be activated. In the event the discipline is activated as an actual suspension you will be required to serve the suspension in addition to discipline that may be associated with any infraction subsequent the one being assessed herein.

As a matter of record, a copy of this document will be placed in your personnel file."

Union Position

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position is the Company has assessed excessive discipline and assessed discipline in violation of the Collective Agreement.

The Union stands by its' position as provided in our grievances where the deferred suspension was assessed.

The Grievor, was a relatively new employee and who would still be wearing a "green vest" identifying him as a new employee and someone who would still be learning and should be mentored and educated along the way.

The Grievor took responsibility for what had happened, provided his commitment moving forward and accepted all that had been learned through the process. There was no need to further had a suspension without pay to this employee, wage loss punishment is not an educational tool but exactly what it is, punishment.

The purpose of the investigation process is to gain all the facts of the incident, look at preventive measures so as not to happen again, educate the employees involved.

The Union requests that the discipline assessed to the Grievor be expunged and he be compensated all loss of wages with interest, and the 5-day deferred suspension if activated will have be done in violation and therefore all loss of wages be paid to AS for said violation. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Grievor was assessed discipline as shown in his Form 104 as follows: Formal investigation was issued to you in connection with the occurrence outlined below:

"Running through the EW08 East-end switch in Smiths Falls yard April 24, 2023 while working G65-24."

Formal investigation was conducted on May 4, 2023 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation, it was determined the investigation record as a whole contained substantial evidence that you violated the following:

- Rule Book for T&E Employees – Section 9.1

In consideration of the decision stated above, you are hereby assessed a ten (10) Day Suspension, five (5) days suspension and five (5) days deferred suspension.

Your five (5) day suspension will commence on Sunday, May 21, 2023 at 22:01 and end Thursday May 26, 2023 at 22:01.

In the event that you have any incidents within 6 months of the issuance of this letter, the discipline noted herein may be activated. In the event the discipline is activated as an actual suspension you will be required to serve the suspension in addition to discipline that may be associated with any infraction subsequent the one being assessed herein.

As a matter of record, a copy of this document will be placed in your personnel file.

COMPANY POSITION

The Company disagrees with the Union's position and denies the Union's request. The Company relies upon the position outlined in its grievance replies.

The Union suggests the Company has effectively failed to respond to the local grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the local grievance response, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure. The Union has not suffered any prejudice.

Furthermore, the Union alleges that the discipline assessed was excessive, in violation of the collective agreement and serves no educational component. The Company carefully considers the appropriate disciplinary consequence, if any, to be assessed including any mitigating factors or circumstances and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the Hybrid Discipline and Accountability Guidelines.

In all, the grievance has not raised any considerations that give the Company reason to disturb the discipline assessed. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

With respect to the Union's allegations pertaining to deferral of suspension days, the Company cannot agree with this assertion. As the Union is aware, CROA 4630 and 4638 are examples where the arbitrators substituted deferred suspensions with suspensions. The Company maintains that its action of issuing the Grievor a deferred suspension was to promote correctness of behavior through deterrence.

With respect to CROA 4620 the Company position is that it is distinguishable from the present grievance. Moreover, the Company disagrees that clause 39.13 restricts the Company from assessing deferred suspensions.

Moreover, the Policy matter of deferred suspensions as outlined in the Company Hybrid Discipline and Accountability Guidelines is not appropriate to be dealt through an expedited forum of CROA. Should the Union wish to dispute the Policy then they should do so through a Policy grievance.

Further, the alleged violation of clause 39.05 that discipline must be assessed within 20-days after the investigation is completed. A review of the facts presented by the Union in its grievance demonstrate that no violation occurred. The Union outlined that the investigation took place on May 4, 2023 and discipline was assessed on May 17, 2023. This is 14 calendar days, which is within the 20-days outlined in clause 39.05. Therefore, no violation of the collective agreement is found.

The Union has further stated a desire to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments; no violation of the agreement has occurred, and the Grievor is not due any additional compensation. Accordingly, the Company respectfully denies this grievance in its entirety.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion and dismiss the grievance.

For the Union:	**For the Company:**
(SGD.) W. Apsey	**(SGD.) F. Billings**
General Chairmen CTY-E	Director, Labour Relations

There appeared on behalf of the Company:

A. Harrison	– Manager, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Psichogios	– General Chairperson, CTY-E, Montreal
A. S.	– Grievor

AWARD OF THE ARBITRATOR

Introduction & Issue

[1] The Grievor in this case was hired as a Conductor on September 12, 2022 and qualified on January 21, 2023. At the time of this incident in April of 2023, the Grievor was a new “green vest” employee of 7.5 months. He was working as a Brakeman on the G65 Yard assignment, engaged in setting off a cut of cars for a train and was protecting the point. While the Grievor had lined some of the switches for the intended direction of travel, he failed to align one of the switches, and directed the movement through the switches, resulting in a “run through”. The Grievor was assessed a 10-day suspension (5 days served and 5 days deferred) on May 21, 2023. The Union grieved that discipline.

[2] This is the first of two Grievances relating to this Grievor that were argued at the November session. The second Grievance was against the Grievor’s dismissal for failure to disclose both a medical condition and his use of drugs and alcohol, which the Company argued impacted its ability to properly assess his fitness for duty: **CROA 5109.**

[3] For both Grievances, the Union requested anonymization of the Awards, to protect the privacy of the Grievor’s medical condition and how that condition was treated. The Company opposed any anonymization of this Award. The issue of whether this Award should be anonymized has been resolved in **CROA 5109**. That analysis is adopted, but will not be repeated here. **CROA 5109** is directed to be read together with this Award, for the issue of Anonymization. The parties’ *ex parte* Statements of Issue have been amended to reflect this decision.

[4] The Union raised a preliminary issue of whether the Company was entitled to impose a “deferred” suspension. It argued to do so conflicted with the terms of the Collective Agreement and argued it “vehemently opposed” this “sword of Damacles” which hangs over the head of employees, when discipline is deferred. The Company took the position this Arbitrator did not have jurisdiction over that question, as it was the subject of a policy grievance against the Company’s disciplinary policy.

[5] The issues between the parties therefore are:

a. Does this Arbitrator have jurisdiction to consider the issue raised by the Union relating to deferred suspensions? If **so**
b. Can the Company defer all or part of a suspension? If **not**,
c. Is this Arbitrator's discretion appropriately attracted to substitute a different penalty? If **so**,
d. What is that appropriate penalty?

[6] The answers to the stated issues are:

a. This Arbitrator has been granted jurisdiction to address the issue of deferred suspensions in this Grievance;
b. The Company had no basis to defer all or part of its discipline when it chose to discipline with a suspension, as opposed to demerits under the Brown system and that discipline must be vacated. Its decision to do so renders this discipline *void ab initio.*
c. Even if incorrect in that conclusion, it would have been determined the discipline of the Company was excessive and a discipline of a 3 day suspension would have been substituted.

[7] The Grievance is upheld. The Company is directed to correct the Grievor's record by removing this discipline.

Preliminary Issue

Arguments

[8] While conceding that an Arbitrator can defer a portion of a suspension as part of the broad remedial powers, the Union argued the Company was not entitled to do so on its own initiative. The Union argued it has been firmly established by several different CROA Arbitrators that deferred discipline is in breach of the Collective Agreement, yet the Company has continued this practice in defiance of the Awards of this Office. On that basis, the Union argued this Grievance should be upheld, as the Company exceeded its discipline powers in deferring the suspension. It noted in its Reply that it "vehemently opposes" deferred discipline and the resulting "Sword of Damacles" which hangs over the heads of employees disciplined in this manner. Alternatively, the Union argued the

discipline was excessive and that a Formal Reprimand was the appropriate form of discipline.

[9] The Company argued it had appropriately followed it has a management right to defer discipline, and that it had appropriately followed its discipline policy in assessing the discipline in this case. It argued there was nothing in the Collective Agreement that prevented the Company from deferring suspensions; that its discipline policy allowed it to defer all or part of suspensions, when it chooses to discipline in that manner; that its policy was reasonable and consistently applied, and that it met the elements of what is known as the *KVP Test* for determining when a unilaterally promulgated can be applied. When questioned by this Arbitrator regarding the past jurisprudence of this Office against that position, the Company argued it maintained its position, regardless of that jurisprudence. It pointed out that jurisprudence pre-dated the development of its policy and was distinguishable on that basis. It also argued that it was not appropriate for the Union to request a ruling on the appropriateness of a deferred suspension, as that should be challenged through a policy grievance, which the Union had already filed, but which had not yet been advanced to arbitration. It argued this Arbitrator was not "seized with making a determination on the Policy as a whole or its elements as it is not at issue in the instance grievance". It also pointed out that a deferred suspension worked in the Grievor's favour, as it resulted in less of a financial impact. It also noted the deferred discipline was never activated, so the Union is asking the Arbitrator to make a ruling on something that had not yet taken place.

Jurisdiction: Issue of Deferred Discipline

[10] The CROA Memorandum of Agreement provides jurisdiction to this Arbitrator to hear and resolve the issues which are raised by the parties in either their Joint Statement of Issue, or which are raised by either party in the *ex parte* statements of issue. While the JSI cannot clothe a rights Arbitrator with jurisdiction which is properly exercised by another Tribunal (such as by the CIRB), this is not that case. In this case, the Union has put into issue that the "5 day deferred suspension if activated will have be [sic] done in violation".

[11] While not the clearest statement of issue, I am satisfied that the Union has placed into issue whether the Company is entitled to use a deferred suspension - which by its nature is activated at a *future* date - to discipline this Grievor, or whether it was in violation of the Collective Agreement in doing so. I am also satisfied the Company was well aware the Union intended to raise this issue at this hearing and suffered no prejudice from its resolution, given it addressed that argument in its main submissions, and not only in its Reply. While the Union has also filed a grievance against the implementation of the policy, that grievance has not yet been adjudicated and will address additional - and broader - issues relating to the Policy as a whole. This Grievance addresses its impact as against this Grievor.

Was the Company Entitled to Impose Deferred Discipline?

[12] The Company relied on this Arbitrator's decision in **CROA 5059.** That Award held there is an issue of timing for the Union's arguments, and found the appropriate time for the Union to grieve deferred discipline was not when the discipline was later *activated*, but when it was *imposed,* as the grievance is against the ability of the Company to impose that discipline in the first place: para. 6. That direction was followed by the Union, in this case.

[13] As noted in **CROA 4630** the Company decided to forego the Brown System (para. 4) and developed a policy for the use of demerits and suspensions, which has been grieved by the Union in a separate policy grievance. The Company chose to continue to issue a deferred suspension in 2023, as against this Grievor.

[14] It is not the case that CROA panels cannot address issues of discipline even though the Company's policy is under grievance. If that were the case, the CROA process would grind to a halt. Multiple grievances involving discipline imposed under the Company's policy are addressed at each CROA session, each month. Likewise with drug and alcohol issues: Those issues are still being addressed by CROA panels, even though there is a hearing currently ongoing regarding the Company's decision to unilaterally introduce that policy. In certain circumstances it has been found certain underlying issues

are better left to a policy grievance, and in other situations, those issues have been resolved.

[15] Given the Union has put into issue the impact of the discipline policy on this Grievor - and given that the Company in fact has *relied* on the application of its policy to justify its disciplinary choice - this Arbitrator has jurisdiction to address the application of the Company's policy, to the circumstances in this case.

[16] The Company relied on its management rights - as measured by *KVP* requirements - to support its decision to issue a deferred suspension to this Grievor, and on the fact Arbitrators issue deferred suspensions as part of their remedial jurisdiction. On this latter point, the two do not equate. The broad remedial jurisdiction of an Arbitrator is granted by statute, while the Company is governed by the Collective Agreement. Just because an Arbitrator grants a deferred suspension does not support the Company's power to do so.

[17] The *KVP Test* contains several elements that must be met for a unilaterally promulgated policy to be upheld as reasonable. While the Company placed reliance on its consistent *application* of this policy, that is only *one* of the factors noted in the *KVP* decision that must be met for a unilateral policy to be reasonable.

[18] A further element is that any unilaterally promulgated policy must be ***consistent*** with a collective agreement between the parties: A policy cannot be implemented that breaches a collective agreement. It is on this element that the Company's arguments must fall, given the past CROA jurisprudence on that very issue, as between these parties, and given that there was no evidence the relevant Article of the Collective Agreement has been *amended* since those decisions were decided in 2018.

[19] Article 39.13(1) is titled "Deferred Discipline". It is a detailed Article. Upon reviewing that Article, it is apparent the parties have considered a) the circumstances where deferred discipline is appropriately invoked; b) the procedure to be followed for it to be implemented; and c) the type of discipline to which it applies. Article 39.13(1) of the Agreement states "[t]his Clause is intended to address the situation where an individual has been found responsible "*for an incident in circumstances that by themselves are not dismissible, but which, due to the existence of demerit marks on the individual's record,*

would result in dismissal". Article 39.13(2) states that – "…*where the service record of the individual warrants their retention in employment, the employee may be assessed "deferred discipline".*

[20] Article 39.13(3) then describes that "deferred discipline" as:

> …*a procedure whereby the discipline assessed will be annotated on the employee's file, but not added to their demerit mark total provided, for a period of one year following the issuance of the deferred discipline, the employee is discipline-free. Following one year of discipline-free service, the employee's discipline record will revert to its standing prior to the assessment of the deferred discipline.*

[21] Article 39.13(4) provides that if additional discipline is incurred during that one year time period, the discipline that was deferred is then added to the employee's discipline record. By Article 39.13(5), a Grievor can choose not to have his discipline deferred in this manner, in which case the discipline is added to the Grievor's record. A review of the case can also be requested by the Union: Article 39.13(6); with a timeline for when that request is to be made and the review undertaken: Article 39.13(7). That review is to be of the "entire case file...to determine the merits of the case": Article 39.13(8). Article 39.13(9) provides there is no ability "*to progress a grievance or to proceed to arbitration with respect to deferred discipline"*, which may explain why a Grievor may choose *not* to have his or her discipline deferred.

[22] Article 39.13(3) specifically refers to the "*demerit mark total*". Like previous Arbitrators of this Office, I am satisfied this is a reference to <u>demerits</u> *which are accumulated under the Brown System*, whereby an individual is subject to dismissal if 60 total demerit marks are accumulated. In this industry, that is referred to as "dismissal from accumulation". It is noteworthy that there is no reference in Article 39 - or in any other collective agreement provision - to the deferral *<u>of</u>* *<u>suspensions</u>*, in the same manner or under the same procedure which has been agreed to by the parties for demerits, <u>or</u> even for deferral of demerits, *in situations where individuals would <u>not</u> be subject to dismissal if additional demerits are added from a culminating incident.*

[23] The Company maintained it reserved the management right to impose such discipline. Its arguments are not persuasive. Upon review of this Article, I am satisfied the

parties have in fact turned their minds in their Collective Agreement to the use of deferred discipline, and that the Company's actions in issuing deferred suspensions are inconsistent with that Agreement. Multiple CROA Arbitrators have reached the same conclusion.

[24] The modern principle of interpretation has been explained in **CROA 4884** and that analysis is adopted here, although not repeated. It is a "canon of construction" for the interpretation of contracts that - when parties expressly refer to one or more things of a class - it is reasonable to consider that they objectively intended to *exclude* other things of the same class that are *not* mentioned. The Latin term for this principle is "*expressio unius exclusio alterius"*. Applying that canon of statutory construction to Article 39, I am satisfied the parties have specifically "turned their minds" to the issue of when discipline can be deferred; that while the Brown System was being followed when they did so, as also noted in **CROA 4630**, "[e]mployers could *also* impose suspensions under the Brown System, sometimes as a last chance resort" (at para. 4), but that the parties chose not refer to deferral of "suspensions" in Article 39. The parties agreed to deferral in certain circumstances only, under a certain procedure; and then only for "demerits". If the parties had a mutual intention that the Company could issue *suspensions* in Article 39 on a "deferred" basis - and further in circumstances where dismissal was not imminent - they would have included the word "suspensions" in that Article. They did not do so.

[25] Having specifically referred to - and agreed on - the parameters of deferred discipline in the Collective Agreement in the context of *demerits* only, and then only in certain circumstances and with the acceptance of the employee - the Company does not enjoy a unilateral management right to *change* those parameters to which it has already agreed, resulting in deferred suspensions imposed on a unilateral basis. It has fettered its management rights by its agreement.

[26] I am further satisfied this conclusion is consistent with the jurisprudence of this Office, which was issued from three different Arbitrators, all decided in quick succession, in the Spring of 2018. Those decisions are: **CROA 4620**, **CROA 4630** and **CROA 4683**.

[27] In **CROA 4620**, decided March 29, 2018, the grievor had a history of receiving a "five (5) day suspension, with 3 days only to be served with an Admission of

Responsibility", in 2014 and was then assessed a 14-day suspension, with 7 days served, which was grieved. The Union took issue that this type of "hybrid" suspension or "suspended suspension" and argued it was contrary to what was then Article 23.09 of the Agreement. The Arbitrator agreed. He held:

> *The Parties have chosen to define, by agreement, just when and how deferred discipline may be used. This use does not fall within that defined purpose, nor does it adopt the agreed upon procedure. There is nothing in the agreement to authorize a penalty to stand, but only be served in the event of future default. For these reasons alone the penalty must be altered (at p. 6)*

[28] While that direction was clear and concise, it is not clear from that decision whether that penalty was in fact "altered" due to exercise of the Arbitrator's discretion, or whether it was set aside. The Award dealt with several instances of discipline and it is not clear what the result was relating to this particular discipline, as no assessment of that discipline is obvious in that Award.

[29] Two months later, **CROA 4630** was decided (May 10, 2018) by a different CROA Arbitrator who considered the same arguments. The Arbitrator also determined that "*CP's use of deferred discipline is inconsistent with the language to which it agreed in the collective agreement*". The Arbitrator relied on **CROA 4620** and quoted the same excerpt as quoted above. The Arbitrator then stated "[t]he arbitrator agrees with this reasoning as an additional reason requiring intervention".

[30] In **CROA 4638**, decided the next month, in June of 2018, a third CROA Arbitrator considered this same issue. That Award resolved several assessments of discipline, including a 30 day "deferred" suspension. The Union again contended the Company "improperly applied the process of deferral". That Arbitrator also agreed with the Union's position, relying on **CROA 4620** and **CROA 4630** in support. He found that the "*use of deferred discipline must fall within the parameters*" of the collective agreement and that it did not do so in that case. He found this called for an "…intervention and alteration of the penalty rather than voiding the discipline in its entirety." (at p. 11), although his reasoning for that choice was not made clear.

[31] While the Company argued that this jurisprudence should be distinguished because it *pre-dated* the Company's policy - and relied on the *KVP* test in support - the

KVP test does not provide an ability to the Company to act in conflict with the terms of the Collective Agreement. Under *KVP,* any unilaterally promulgated policy imposed by and employer must be ***consistent*** with the Collective Agreement. The Collective Agreement provisions have not in fact been altered since the earlier Awards were issued. In each of these decisions, the Arbitrators of this Office have found that deferring suspensions *conflicts* with its terms. The Company is a sophisticated and large employer. At the hearing, it was unable to justify its discipline choice when asked directly about the previous Awards of this Office, other than relying on its policy.

Is the Arbitrator's Discretion to Craft an Appropriate Remedy Attracted in These Circumstances?

[32] The next question is where does that leave this Grievor? In its Reply, the Union registered its "vehement" objection to a form of discipline which has the "sword of Damacles" hanging over the heads of employees, which it argued deferred discipline does. It noted it would seek damages should the practice continue.

[33] In **CROA 4620, 4630** and **CROA 4638**, the Arbitrators of this Office exercised their discretion to substitute a different penalty, once the Company's improper penalty was set aside, rather than finding that discipline to be *void ab initio* or "void from the beginning" although that option was noted in **CROA 4638**. However, none of those Arbitrators expressed any reasoning for that choice.

[34] CROA Awards have historically been very short, with very limited reasoning. That reality has recently changed given the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, which was issued in mid 2019. To address the issue of where that leaves this Grievor in this case, it is necessary to take a step back and consider first principles under which an Arbitrator's discretion is attracted to substitute discipline.

[35] The ability for an arbitrator to substitute a different penalty has been confirmed in both federal and provincial statutes. It must be emphasized, however, that it is a "discretionary" decision, to be based on all of the circumstances. In assessing discipline,

CROA Arbitrators have relied on the well-accepted principles developed by Chair Weiler in *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. No. 98.

[36] The *Re Wm. Scott & Co* framework requires that an arbitrator ask three questions. The first relates to culpability; the second to whether dismissal was "excessive", considering all of the aggravating and mitigating factors; and the third whether an arbitrator should use her statutorily provided discretion to craft and substitute a different remedy.

[37] In describing the "*point*" of this third question, Chair Weiler made the following comment:

> Within that framework, ***the point*** *of the third question is* ***quite different than it might otherwise appear.*** Suppose that an arbitrator finds that discharge and the penalty imposed by the employer **is excessive and must be quashed**. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off scot-free *simply* ***because the employer overreacted*** *in the first instance.* ***It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case,*** perhaps even utilizing some measures which would not be open to the employer at the first instance under the agreement… (at pp. 8, 9, emphasis added).

[38] The reasoning for an arbitrator's exercise of discretion to substitute a penalty under the *Re Wm. Scott* framework is that the employer's response was "*excessive*" or resulted from an "over-reaction"; not because the employer's disciplinary choice was in breach of the Collective Agreement in the first place. If the employer had *no basis* on which to impose the discipline it chose because it conflicted with what it had agreed in the Collective Agreement, it is questionable whether this "discretion" referred to in question three would even arise, as the discipline would likely be found to be *void ab initio,* or "void from the beginning" *as having no foundation to support it.*

[39] The application of that concept to this industry has recently been adjudicated, up to the Appellate level. In *TCRC and Sims v. CN* 2021 SKCA 62, the Saskatchewan Court of Appeal restored the Arbitrator's decision that discipline was *void ab initio.* That Court recognized that in CROA's specialized and unique expedited arbitral process, the concept of discipline which is *void ab initio* remains applicable. In that case, the issue was with the procedural fairness of the investigative process, given that Arbitrators in this industry must

rely on that transcript for fact-finding, as oral evidence is rare. However, the Court of Appeal's concern also arose from the impact on the integrity and structure of the CROA process itself.

[40] That decision referred to the standards of CROA as "mandatory and substantive". Those comments recognized that the structure and integrity of CROA is governed not only by the CROA Rules, *but also by the collective agreement terms*. As described by the Arbitrator:

> *By a combination of collective agreement terms (specific to each bargaining relationship) and adherence to the rules and procedures of the [CROA], the parties allocate part of the "due process responsibilities" to the workplace and other parts to the CROA panels. The CROA panels that carry responsibility for the resulting decisions can only ensure that overall due process is met by requiring the parties to adhere strictly to their part of the due process bargain. This is not just a matter of contract law, but of the administrative law rules that ensure that the basic elements of fairness…are met in individual cases. CROA panels achieve this by ensuring that the parties comply with the pre-termination rules they have themselves agree to. But it is not only that they have agreed to them, it is because such agreements, despite the variety in content, are essential to the workings of the broader CROA system the parties have adopted* (at 28-29; emphasis added).

[41] In *TCRC and Sims v. CN,* the Arbitrator also noted the issues of "due process and fairness concerns inherent in the structure of the CROA arrangement" (at 25), and the systemic concerns with the need to protect the integrity of the CROA system (also noted by the Court of Appeal at para 56 and referenced by the QB at para. 53), as well as the potential impact of his Award on that system.

[42] At para. 56, the Court of Appeal stated:

> The CROA Authorities and the Arbitrator, on the other hand, emphasize systemic rather than case-specific concerns; that is, they focus on the need to protect the integrity of the unique CROA system the parties agreed to adopt in the MOA to meet the particular needs of employers and employees in this industry….he was obliged to take account of the MOA and the potential impact of his decision on the CROA system that embodies that agreement (emphasis added).

[43] In the present case, systemic concerns and the "*need to protect the integrity of the unique CROA system*" are once again placed into issue. In this case - as in *TCRC and Sims v. CN* - the Union had no choice but to pursue its Grievance through the channels

of CROA. The case was filed to come before this Office, and the grievor had to live with the "sword of Damacles" (in the words of the Union) dangling over his head, while his Grievance was processed. Not only was the procedure under Article 39 not followed by the Company, (resulting in a breach of the Collective Agreement), but the previous Awards of this Office which already resolved this issue as between these parties were also disregarded.

[44] The Company's position was first discounted in **CROA 4620**, back in 2018, by a trio of Arbitrators. *KVP's* requirements are clear and unambiguous. To be reasonable, a policy cannot be inconsistent with the Collective Agreement.

[45] Since those three Awards - and since the Saskatchewan Court of Appeal's decision in *TCRC v. CN and Sims* - the Company has had several years to consider its position and choose whether to continue to breach the Collective Agreement by issuing deferred suspensions.

[46] From a review of both the disputed Article and the CROA jurisprudence, the Company had no basis to impose its discipline and was in breach of the Collective Agreement in making the choice it did, in this case.

[47] That discipline must be set aside as *void ab initio*, or "void from the beginning".

<u>If That Conclusion is Incorrect, was the Company's Discipline Excessive?</u>

[48] Even if it were determined that this Arbitrator was incorrect in that conclusion, and the discipline is not *void ab initio,* it would have been determined the Company's discipline choice was excessive and cannot stand. A lesser form of discipline would have been just and reasonable and would have been substituted.

[49] The Company urged its discipline was not excessive. It pointed out that running through a switch could result in not only damage to the switch, but a derailment or a collision; that the incident was "easily avoidable" if an employee is working in a safe and attentive environment; that the Grievor worked largely unsupervised and the Company had to rely on him to follow all safety rules. It also argued it fairly, appropriately and consistently applied its *Hybrid Discipline & Accountability Guidelines* (also referred to as

the “Policy” in this Award) to this incident, which required a minimum 10-day suspension, up to a 40-day suspension, for a first “major” offence, which failing to align a switch was, and that it took into account of the mitigating factors by deferring five (5) days. The Company distinguished the Union’s jurisprudence in its Reply, arguing it was from a time when the Brown System of discipline was in use, so was demerit-based due to that timing. It also pointed out that Arbitrators have imposed deferred suspensions as appropriate discipline.

[50] The Union urged argued that ten (10) days was an excessive penalty. It argued a formal reprimand was appropriate for this first offence, given all of the factors, as was assessed in **CROA 5032.** It argued that a formal reprimand would provide a “learning experience” to this new employee. It also relied on **CROA 5066**, where a 20-day suspension was reduced to 15 demerits, and several other cases that were decided before the Company began to use suspensions instead of the Brown System for discipline. In its Reply, the Union noted the emphasis placed by the Company on following its own discipline policy as its justification. It argued the Company was trying to fit a “round peg” into a “square hole” by doing so. It noted the incident did not involve any serious collision or derailment, injury or fatality or even extensive damage to Company property, and that it did not qualify as a “major” offence even under the definition in the Company’s own policy. It argued the Company used its policy as a “pushing off” point, which assumed a suspension would issue, between ten (10) and forty (40) days. It also argued it was improper to decide on a level of discipline and then use mitigating factors to “defer” that suspension It argued those factors should have been followed at the outset. It also distinguished the Company’s authority.

Decision in the Alternative

[51] In a highly safety-sensitive environment, errors can have catastrophic consequences. The safety rules which exist in such an environment have been developed for important reasons. I am satisfied that part of the core duties to be performed by the Grievor was to line switches, to protect the point. I am also cognizant that all humans are capable of making errors.

[52] How those errors are understood and processed by an individual creates the differences between the employees who show a pattern of similar mistakes and those who learn and move on and do not repeat inattentive behaviour. As can be seen from a review of past jurisprudence of this Office, an important mitigating factor for Arbitrators is the Grievor's level of remorse, attitude and insight, which is most often displayed during the Investigation, but can also be displayed through other conduct. If an employee does not have insight into his own actions - and does not show understanding for how a mistake was made; and if a grievor does not accept responsibility (for example deflects to the conduct of others or is evasive about admitting his or her error), that individual fails to provide assurances to the Arbitrator that the same mistake will not be repeated. The opposite is also true.

[53] I agree with the Union from a review of this short investigative interview transcript that the Grievor was forthright during that interview process; that he was not evasive; that he took accountability for his role in this incident; that he agreed that he was not in compliance with the relevant rules (at Q/A 18) and also indicated he felt "extremely remorseful"; that he was able to understand what occurred and how he was distracted by events at home; and the work it created for other employees (which is an aspect of run-throughs that is not always understood); and that he should have been paying closer attention. He also expressed a commitment to "being vigilant and rules-compliant while working here". The Grievor also provided an apology for his actions. Against these factors is the seriousness of the offence, and the fact that aligning switches is a core part of the Grievor's job duties, to which he would be expected to bring care and attention, given the potential for significant consequences, although those consequences did not occur in this case. The Grievor's level of service is not mitigating, as he was a short-service employee, but he did have a clean record.

[54] From a wholistic review of all of these factors, I would have been satisfied that a 10-day suspension for this run-through was an excessive disciplinary response, in all of the circumstances of this case. Had the discipline not been found to be *void ab initio,* that suspension would have been set aside. That would have raised the third question in a *Re Wm. Scott* analysis, which is whether an alternative form of discipline should be substituted in this case, and if so, what should that discipline be? This Grievor

demonstrated considerably more remorse than the grievor in **CROA 5059**. The mitigating factors in this case are significantly different than those in **AH858** where the Grievor not only failed to line a switch, but then rode the tail end instead of the point. A formal reprimand as argued by the Union fails to consider the seriousness of the failure to line switches in this industry and that it is a "core" job responsibility.

[55] Considering all of the factors and the jurisprudence, had it been required, the discipline of 10 days would have been vacated as excessive in these circumstances. Discipline of a 3 day suspension would have been substituted as a just and reasonable disciplinary response.

Conclusion

[56] The Grievance is upheld. The discipline is *void ab initio*.

[57] The Grievor is to be made whole for any loss and the Company is directed to amend the Grievor's record, to reflect this change.

I retain jurisdiction for any questions relating to the implementation of this Award; for any issues of remedy or arising from my directions on which the parties are unable to agree; to correct any errors; and to address any omissions, to give this Award its intended effect.

February 14, 2025

CHERYL YINGST BARTEL
ARBITRATOR