CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5122

Heard in Calgary, January 14, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discipline assessed Conductor Johnson – 15 Demerits for circumstances surrounding your failure to complete the reporting while working as foreman on the YSC633-18.

JOINT STATEMENT OF ISSUE:

On August 18, 2023, the Company alleged that Conductor Johnson failed to complete his reporting while working as the Foreman on MacMillan yard assignment YSC633-18.

As a result, the Company required Conductor Johnson to attend a Formal Employee Statement on August 23, 2023. Following the Formal Employee Statement, Conductor Johnson was assessed 15 demerits on September 16, 2023.

The Union grieved the discipline. The Company responded at Step 3 of the grievance procedure on November 29, 2024, the Union alleges is outside the time limits contained in the 4.16 Collective Agreement.

Union's Position:

It is the Union's position, however not limited hereto, that the Company violates Article(s) 82, 84, 85, 85.5, Addendum(s) 123 and 124 of Collective Agreement 4.16 as well as Arbitral Jurisprudence, and the Canada Labour Code.

The Union contends that the discipline assessed to Conductor Johnson was excessive, unwarranted, and discriminatory.

The Union further contends that the Company failed to show that this alleged failure was anything but benign, as it had no impact on the operation. This entire investigation was an attempt to "get" Conductor Johnson.

The Union requests that the arbitrator remove the discipline in its entirety. Alternatively, the Union seeks to have the discipline reduced to a level commensurate in keeping with the Brown System of Discipline as the arbitrator deems appropriate.

Company's Position:

The Company does not agree with the Union's position.

The Company does not agree that the discipline was excessive or discriminatory, or that the Collective Agreement or legislation were violated.

The discipline assessed was in line with the Brown System of Discipline for similar matters, in consideration of the grievor's disciplinary record, length of service, and the actions that gave

rise to the discipline. The Union has not provided evidence to support the claims that the discipline was discriminatory.

The Company does not agree that a remedy is applicable in this case, additionally, the Company does not agree that Article 85 was violated. The Company acted in a reasonable manner due to the grievor's failure to complete a required task before the end of his shift.

For the Union:	**For the Company:**
(SGD.) J. Lennie	**(SGD.) T. Sadhoo**
General Chairperson, CTY-C	Labour Relations

There appeared on behalf of the Company:

T. Sadhoo	– Labour Relations Manager, Toronto
S. Matthews	– Senior Manager, Labour Relations, Toronto

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Hamilton
G. Gower	– Vice General Chair, Brockville
E. Page	– Vice General Chair, Hamilton

AWARD OF THE ARBITRATOR

[1] The Grievor was hired as a Conductor trainee on March 28, 2022. He qualified as a Conductor on October 14, 2022. The Grievor was therefore a short-service employee.

[2] The Grievor worked out of MacMillan yard, in Toronto, Ontario. At the time of this event in August of 2023, the Grievor was working as Foreman on assignment YSC633-18.

[3] The Union has argued the Company is “out to get” this Grievor, and that it has grieved four instances of discipline on his behalf. Three of those have come before this Arbitrator: This grievance (15 dm); that resolved in **CROA 5098** (20 dm upheld for having a powered-on cell phone on him while being transported across the yard) and that resolved in **CROA 5123,** also heard in the January 2025 CROA Session, which is for an incident which occurred after the events at issue in this Grievance.

Facts

[4] It is not disputed that on August 18, 2023 the Grievor “forgot” to complete his reporting. He failed to “update that the pull cars were in L035 and L036 at the end of his shift. He “erroneously reported that the pulled cars were in a “dummy track” (Track YT01),

which is not a physical track, but a setting in MRS to show the train consist" (Company Brief, para. 11).

[5] The Grievor had not switched the traffic into the proper track.

[6] While the Union presented various arguments as to *why* the Grievor did not do so, it is not disputed that the Transportation Manager discovered this issue and completed the work himself. On August 22, 2023, Transportation Manager McNay wrote a memo, which stated:

> While working as GST the night of August 18, 2023, I noticed the industrial assignments traffic hung up in a dummy track YT01 Mac Yard when I was looking for the traffic in SRS to process it. This was at 2300 hrs after the YSC633 18 (industrial) crew had left the property. I logged into my tablet and completed the crews work for them by switching the traffic into a proper track.

[7] On August 19, 2023, TM Khanna reported on a discussion he had with the Grievor about his failure to complete reporting on YSC633-18 the previous day. He reported that on August 19, 2023, he asked the Grievor why he had not done the work, and the Grievor "replied he forgot doing it". The Union argued the Grievor provided a more fulsome explanation at that time, which will be discussed below. These facts are sufficient to set the stage as background for what occurred. The balance of the facts will be set out in the *Decision* portion of this Award, as a credibility assessment is required.

[8] The issues between the parties are:

a. Has culpability been established for some form of discipline? If so,

b. Was the discipline assessed just and reasonable; and, if not,

c. What discipline should be substituted by the exercise of this Arbitrator's discretion.

[9] For the reasons which follow, culpability has been established for discipline. The Union's explanations are properly considered under the second question and do not impact culpability. When considering all of the factors, the discipline was just and reasonable.

[10] The Grievance is dismissed.

Arguments

[11] The Company argued that reporting is a critical task of a Conductor. Without reporting, it argued it could not properly run its operations, or service to its clients. While electronic reporting may be relatively new, paper reporting is not, and has been a longstanding core duty of a Conductor.

[12] It argued the Grievor did not report any difficulty with his duties; he failed to complete those duties; and he left those duties to be discovered and addressed by the Company, which caused an operational disruption. It argued his mis-steps should not be "minimized". It argued that considering all of the mitigating and aggravating factors, including the Grievor's short service and poor disciplinary record, its discipline of 15 demerits was just and reasonable. In Reply, it argued the conversation referred to by the Grievor was not "heated" and is not so egregious to explain the Grievor's forgetfulness; that the Grievor completed his MRS training in March of 2023 and had been using that system for at least two months; that the Grievor was aware of his reporting obligations and that using the MRS system was part of the Grievor's job duty, and he called it his "job duty" in his statement; that the Grievor failed to seek extra support on the MRS; that the MRS refresher training is available to the Grievor electronically at any time; that the expectation of completing job duties was reasonable and is a core duty; that this was not a "clerical error", as the TM had to perform the Grievor's duties; and that the information on location is provided to the Company's customers. It argued its investigation process was fair and impartial; and that the misconduct warranted 15 demerits.

[13] The Union first argued the Company did not have just cause to discipline the Grievor. It argued the Company failed to establish the existence of a policy that the Grievor violated for reporting, relying on the *KVP* test. It argued the Union objected to the MRS system and the inadequate training. It also urged there was no prejudice to the Company from the Grievor's mistake. It argued the processes set out in the Notice – which it described as the Company's "keystone" document - are dated, relate to the faxing of paperwork for records, and not the electronic MRS, and were not brought to the Grievor's attention.

[14] It argued this was the first discipline the Company had issued for reporting in the MRS; that this was a new set of duties, with which the Grievor was unfamiliar; that there was insufficient training, it argued the Grievor was still not comfortable with the MRS system and had offered a clear and forthright explanation for his forgetfulness. It pointed out the Grievor attempted to correct his forgetfulness when he arrived home, but was "locked out" of the terminal; and argued the Company was not providing sufficient guidance and training for new Conductors trying to use this new technology; that the Grievor was not aware of the expectations under the MRS system; and that it was entirely different from the Daily Operating Plan ("DOP") and manual reporting system that the Notice applied to. In Reply, it took issue with the Company's reliance on the MRS screenshots; its reliance on the training received by the Grievor; and its assertions of how often the Grievor used the system, which it argued were not placed before him at the Investigation. It argued the Grievor had performed a "clerical error". It argued **CROA 3870** was distinguishable and involved a Grievor who failed to enter train delays "over several days". It also distinguished the other jurisprudence relied on by the Company.

[15] It alternatively argued that the discipline was excessive and the Company had not met its burden to establish the discipline was reasonable. It argued this was a "minor inadvertence", resulting in a brief inaccuracy in car location, without any safety implications or operational setbacks; the oversight was caught quickly by the Company and there was no evidence of operational impact. It pointed out that the Grievor was coached and this should have been sufficient; and that the imposition of 15 demerits was "excessive".

Decision

[16] This is not an arbitration to determine the reasonableness of the Company's MRS system, or whether the Company has offered sufficient training on that system. As noted in **CROA 5033**, if there are systemic issues in training, it is "*beyond this arbitrator's jurisdiction to address"* those deficiencies. This is an arbitration to determine if the discipline assessed to this Grievor is warranted; and if so, if the measure of it was just and reasonable.

[17] The Grievor was interviewed on August 23, 2023. I have reviewed the Grievor's Investigative transcript carefully. I cannot agree with the Union that it demonstrates the Company was out to "get" the Grievor or that the Company was "pressing" the Grievor for a different explanation unfairly. The Company is entitled to ask the Grievor questions in various manners to test the Grievor's answers. As noted below, the Grievor's answers were not as "clear and forthright" as was argued by the Union.

[18] The evidence of the two transportation managers ("TM's") noted above, was filed into that Investigation. When asked if he had any rebuttal to the evidence filed by the Company, the Grievor's evidence was that he was "*diverted away* "from *my job duty*" by "*another Manager who was addressing an issue with my mate*". When asked where he left his pulls on August 18, 2023, the Grievor noted "*[m]y mate told me he put some into L035 and L036*" (Q/A 27) and that he did not complete the reporting "*as required*" "*at that time*" (Q/A 28). When asked to explain what he "*forgot*" to do, as referenced in TM Khanna's discussion with him, the Grievor stated "*Refer to my refuting of the evidence*" which presumably is his explanation that his attention was diverted away from his job by the actions of a manager addressing an issue with another employee. The Grievor also stated that TM Khanna's comments that he "*forgot*" was not the full conversation, and that he explained that he was "*diverted from my job duty* by what was going on with his colleague and a situation with another manager (Q/A 8). The Grievor stated he did use the MRS to report his spots and pulls, and that he did not know what Track YT01 was. It was explained to him that the cars get held in TY01 until he reported them into an actual track. It was the Grievor's evidence he used the MRS for "approximately two months" (Q/A 9) and it was new to him, and he was not comfortable with it and had asked for help with it in the past.

[19] A lack of understanding of the MRS would explain if tasks were performed incorrectly, but does not explain tasks that were not performed and were forgotten. It is relevant there is no evidence the Grievor reached out for help on August 18, 2023 to complete his duties in the MRS. To explain his forgetfulness, the Grievor referred to an interaction with TM Travis during the day, which caused him to be "*lost in thought*" and with a conversation with his colleague. As a result, the Grievor failed to bring the level of attention to the reporting tasks required. The Grievor also stated he had 'no recollection'

of seeing Notice 22-05-24. Notice 22-05-24 is a Notice that reminds employees to send in completed paperwork prior to the end of their shift.

[20] The Union has argued that there is a lack of just cause because the Company did not bring this “keystone document” of the Notice to the attention of the Grievor; and did not bring any policy regarding reporting to the attention of the Grievor.

[21] I am satisfied that reporting what duties are performed is a core aspect of a Conductor’s duties, in this industry, regardless of the system the Company puts in place for that to occur. I do not find the Union’s arguments convincing that no just cause is evident if the Grievor wasn’t well-versed in all of the requirements of the MRS system to complete paperwork, or was unaware of the Notice. The point is the Grievor had an obligation to report his work under the system the Company developed and failed to complete that aspect of his work. He failed to complete his job tasks. The Grievor was not disciplined for failing to follow the Notice; he was disciplined for failing to report the duties he performed.

[22] It is unnecessary for the Company to *establish* the Grievor had a reporting obligation, as I am prepared to accept that reporting is part of the job duties of a Conductor in this industry. It cannot be maintained that “reporting” is an aspect of the Grievor’s job that he was unaware he had to complete, before he went home. In fact, he referred to the work he was doing in the MRS as his *“job duty*”. That there were duties he was to perform is not at issue. Frankly, whether he was aware of the specifics of this Notice or not, the Grievor was aware he had to report what was done that shift. That is a core duty of a Conductor. While the MRS may be a new system for that reporting, the underlying requirement *to report* is not new in this industry.

[23] The Union has taken issue with the screenshots included in the Company’s Brief. It is unnecessary to review that information or address that objection, given that the Grievor in this case has admitted that he “forgot” to perform his duties because he was distracted.

[24] The Union’s concerns surround the MRS system itself, which is *how* reporting is done. However, the evidence in this case is that – while the Grievor had difficulties and sought help in the past with the MRS – he did not seek any help or indicate any difficulties

to the Company with the MRS for his reporting on August 18, 2023. "*Forgetting*" to complete duties is not the same as not knowing "*how*" to complete duties in the MRS.

[25] If the Grievor was struggling with the "how" to complete his duties – and I am not convinced he was on these facts – it was up to him to seek out help, as he stated he had done in the past. It is not a reasonable response – even if he were confused - to simply not perform the task and go home, leaving it to someone else to find it was incomplete and then perform the Grievor's work.

[26] Neither is it necessary that the Company establish it suffered prejudice for it to have just cause for discipline. Discipline follows culpable conduct. Forgetting to complete reporting tasks for work you are assigned and going home before your work is completed is culpable conduct. A manager having to perform your work because you forgot to do it or were distracted from doing it, is culpable conduct.

[27] The Grievor's evidence was that when he "*got home I did try and get into MRS to finish the switching but I was locked out of the tablet by (TM McNay). Which I assumed was another crew trying to finish up the move in S-Yard I was unable to complete during my shif*t" (Q/A 8). I find this evidence to be less than compelling and not to be credible. If in fact the Grievor did make that attempt and was unable to 'fix' the issue, it is curious he did not - on his own initiative - find his managers the next day or contact someone at the Company to let them know of the work not completed, and what he had tried to do from home, all in keeping with his stated attempts to fix his own issue. There is no evidence that occurred.

[28] To summarize, I am satisfied the Grievor was aware of his reporting obligation; that he forgot to do his work while he was at the yard, which was required, and that he went home at the end of his shift having forgotten this work. There is no evidence he sought any assistance from a supervisor on that day for any alleged difficulties with the MRS. If he had difficulties on that day, he could have consulted a supervisor to assist him complete his work, *before* he went home. He did not do so. The evidence, rather, is that the Grievor became distracted with events around him, and simply forgot to complete his tasks. Given the Grievor's stated difficulties with that task, it is one he should have brought his considerable attention to. He did not. I am satisfied he did not pay close enough

attention to what he was doing; and "he forgot" about completing his reporting. He left the yard with his reporting not done and went home. I do not find credible his evidence he recalled the work was left done and tried to complete it from.

[29] That raises the second question of a *Wm. Scott* assessment, which is whether the discipline was just and reasonable. Mitigating and aggravating factors are considered at this point.

[30] The Union argued the disagreement with the TM on the day the Grievor forgot was "very heated", however that is not how the Grievor described that interaction in his interview. In his interview, the Grievor described that "*we were stopped by TM Travis and they were having a conversation which was not know [sic] to me at the time*". He also said this colleague was "*trying to tell me what happened and that is when I found out he had put some cars in L035 and L036…" and that "[a]t the end of the shift we were both lost in thought about the events that happened with TM Travis, and I left…*" (Q/A 35).

[31] He did not describe a "*very heated*" conversation occurring. The "heatedness" of that conversation is therefore not a mitigating factor.

[32] The Union also argued the Company is out to "get" the Grievor. I have not found evidence of that attitude, either in the Investigating interview, or in the surrounding facts and circumstances. Reviewing the Grievor's disciplinary record, in **CROA 5098**, this same Grievor was disciplined 20 demerits for having a powered-on cell phone in the yard. That discipline was upheld at arbitration as just and reasonable. He also had a written reprimand for booking sick.

[33] That meant the Grievor was <u>already</u> 1/3 of the way to dismissal at the time of this Grievance. That is a significant discipline record for a short service employee.

[34] As in that case, in this case there is the same "*confusing lack of measured attention and carelessness shown for the essential tasks of a Conductor's work*" (at para. 43). I take the Union's point that - unlike in **CROA 5033** - this case does not involve a safety infraction and is not of the same, serious nature. In that case, 28 cars rolled down the track due to the Grievor's misconduct. The nature of the offence is relevant.

[35] The Union argued that coaching was given and should have been sufficient. Had the Grievor been a longer service employee, or had the Grievor shown any unprompted remorse or understanding that forgetting to perform tasks caused operational issues for the Company; or had he been remorseful and apologetic demonstrating insight into his failure to fulfill his duties; or had he asked for help that day on the MRS system that was not available; or had the event which distracted him been a major and unexpected issue which could reasonably have distracted an individual (i.e. not expected); or had the Grievor not already had 20 demerits for failing to follow the Company's rules regarding cell phone use, the Union's position for coaching – or a lower level of discipline - would be stronger. However, as it stands, there are very few mitigating factors.

[36] The Grievor is a short-service employee, so he does not have a length of service to place against the discipline. Significantly, he also offered no apology or remorse for his behaviour at his interview and did not demonstrate insight into the concerns caused by his "forgetfulness". Certain of his evidence was also found not to be convincing. The factor of remorse – which could have been mitigating as demonstrating some insight – was not present in this case. The Grievor's explanation of having a "*distraction*" was not particularly compelling, either. A colleague having a discussion with a supervisor is not unusual or unexpected. The Grievor is expected to be able to complete his job tasks even when such conversations or ongoing, or tell his colleague to talk to him once he was finished his reporting.

[37] Whether the Grievor provided a more fulsome explanation to the TM – as argued by the Union – or not, the explanation of being "distracted" by the work going on around him is not particularly compelling.

[38] It is mitigating that the matter was addressed quickly by the Company and there was no evidence of impact, but it is aggravating that it was not the Grievor who brought it to the attention of the Company.

[39] I have reviewed the jurisprudence filed by the parties.

[40] **CROA 3870**, while short, is the closest fact situation to the matter at hand, in that jurisprudence. Arbitrator Picher upheld discipline of 15 demerits as reasonable for the Grievor's "*failure to properly record train delays into the Company's computer system"*.

The Grievor's explanation in that case was he was relatively new to the territory he had been assigned. In that case, the Grievor alerted no one else to the problem. The same situation occurred in this case.

[41] While that occurred on two occasions, and this is only one occasion of distraction, in that case it was also the Grievor who recorded the information on a "train sheet", so he did not simply "forget" to perform the tasks because he was distracted, as did this Grievor, which is aggravating for this Grievor.

[42] In **CROA 3870**, the Arbitrator felt the Grievor's uncertainty did not "*constitute an answer to an obvious failure to discharge his responsibilitie*s". The same is true in this case.

[43] From a review of the evidence and jurisprudence, the assessment of 15 demerits was a just and reasonable response, in all of the circumstances of this case.

[44] The Grievance is dismissed.

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

March 6, 2025

CHERYL YINGST BARTEL
ARBITRATOR