CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5123

Heard in Calgary, January 14, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discipline assessed Conductor Johnson – 20 Demerits, "your alleged involvement in circumstances surrounding the run through switch while working the YTSS30 (industrial) on October 06, 2023".

JOINT STATEMENT OF ISSUE:

On October 6th, 2023, Conductor Johnson operated through a switch that was improperly lined within the confines of MacMillan Yard while assigned to yard assignment YTSS30. As a result, Conductor Johnson was investigated and assessed 20 demerits following a Formal Employee Statement.

The Union grieved the discipline. The Company responded to the Step 3 grievance on October 2, 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 is in violation of 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 and discriminatory.

The Union seeks to have the discipline removed in its' entirety. Alternatively, the Union seeks to have the discipline reduced to a level commensurate with the Brown System of Discipline and arbitral jurisprudence 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 switch that was run through and the grievor's failure to ensure that he adhered to the Canadian Rail Operating Rules (CROR) when he violated CROR Rule 114.

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

Background & Issue

[1] The Grievor was employed as a Conductor. He was hired in March of 2022; and qualified on October 14, 2022. He was based at MacMillan Yard, in Toronto, Ontario.

[2] As this event took place on October 6, 2023, the Grievor was a short-service employee.

[3] The Grievor was called as a Yard Foreman for the YTSS30 operating at MacMillan Yard. His crewmate, Mr. Utiuzh was also a rules qualified employee with approximately one year of service. Both employees had training trips in MacMillan yard. The Grievor had approximately 58 training trips; and his crewmate had approximately 60 training trips.

[4] On that day, the Grievor was protecting the point when his movement proceeded past the Halton Outbound Switch, which was lined against his movement. As an outbound switch, the Halton Switch protects the main track.

[5] The Grievor was investigated and assessed 20 demerits. This Grievance was filed against that assessment.

[6] It is not disputed that the Grievor ran the Halton switch and ended up foul of the track. The Union has raised an issue that the Investigation was not fair or impartial.

[7] The issues between the parties are:

a. Was the Investigation process fair and impartial?

b. If so, was the discipline imposed just and reasonable; if not

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

[8] For the reasons which follow, the first two questions are answered as "yes"; and "no". A substitution of 15 demerits is appropriate.

[9] The Grievance is allowed, in part. The discipline of 20 demerits is vacated and 15 demerits are substituted as just and reasonable discipline.

Facts

[10] The Grievor was investigated on October 10, 2023. He confirmed he had been called for the 1400 industrial belt pack assignment and that he was trained on the CROR and the GOI.

[11] It was the Grievor's evidence his crew had a job briefing before beginning their work, where they discussed that the previous day a crew had ran the same Halton switch which is at issue in this Grievance.

[12] When asked to describe in his own words what had occurred, the Grievor's answer was "The incident report details the event as it occurs" (Q/A 17). A handwritten memo was written by the Grievor and entered into evidence, dated the day of the incident. In that memo, the Grievor stated:

> On Friday, October 6, 2023 at approximately 22:02, whilst working Industrial, we were instructed by the Train Manager to pull L35 + L36 with our Pulls from the West 100 and take to R. My mate was the one completing the task at the time. He was finishing coupling of both Tracks and need Head room to clear the Hill Switch. He Told me he was going to contact the yardmaster for use of York 3. He came back on the South channel which is normal and for working Industrial and other South end Jobs, and Told me He wasn't getting the Dual yard master so I said

> maybe I could Try Side Tower seeing That he didn't need more than 10, cars. I called Side Tower He gave permission and I started pulling + then notice The Halton outbound Switch was against us so I started slowing down gradually adding brakes I thought it would be able to stop so I Throw it to stop I notice IT was still going I Threw into Emergency. Still didn't stop In Time and Front wheels broke the Switch *(emphasis, grammar & punctuation as written*). Engine - 7274

[13] The Grievor confirmed he was in control of the movement while pulling towards the Halton outbound switch (Q/A 18), and that he was riding the leading piece of equipment (Q/A 19). He confirmed the CROR applied to MacMillan Yard; and that he attempted and made an effort to comply with CROR Rule 105 and 114, requiring stopping for signals/switches not lined and for not stopping foul. It was the Grievor's evidence he felt he had control of his movement when he approached the Halton outbound switch. His evidence was he was approximately 1.5 cars from the Halton outbound switch when he put his OCU into stop; and that he was in "*coast b and feathering the independent for about 2-3 cars before putting the speed selector to stop*" (at Q/A 29). His evidence was he was between 25 feet to a car length when he put his speed selector to emergency. His evidence was he needed roughly 4 more car lengths to clear the hill switch.

[14] The Grievor made a commitment in his Investigation to be a "*safety ambassador*" which commitment he also stated he made while training in Winnipeg. He stated he had learned from "*all incidents I've been in*" and "*will ensure it will not happen again*" (Q/A 32).

[15] The Grievor's Union representative questioned the Grievor regarding how many cars he was controlling, which was "about 50" (Q/A 34). He asked him if he was informed of the weight of his movement and if his movement had air in the train line. Both questions were leading. The Grievor answered he was not aware of the weight of his train, and there were no air brakes.

[16] The evidence also was that air brakes are never used in the MacMillan yard.

[17] When asked what speed his movement was travelling when placed into emergency, the Grievor said it was "less than couple speed but it felt like it was sliding". When asked how far past the switch the Grievor traveled, he stated that the "lead trucks were in the switch".

[18] When asked if the Grievor had anything else to add, he stated “Not at this time” (Q/A 43).

[19] The Grievor’s crewmate, Mr. Utiuzh was also interviewed. He also referred to the “incident report” when asked to describe in his own words the circumstances leading to the incident:

> Around 22:10 at above date, myself and conductor trainee Jason were counting down to my mate conductor Everton. We were suppose to clear a hill switch to bring all cars from L35 and L36 to the R-yard. I told conductor Everton on the point to pull as much as he can it was about 10 cars more to clear so I was trying to get a hold of Dual Yardmaster to get a permission for York 3. After few attempts conductor Everton informed me that he will contact a Side Tower to get a permission for Halton. A few minutes later conductor Everton confirmed on the radio that we are okay for the Halton, and he starts pulling. After about pulling 8 cars train stopped and conductor Everton informed us that he ran a Halton switch and will be contacting side Tower (*grammar and punctuation as written*).

[20] Mr. Utiuzh confirmed the Grievor’s evidence that the crew had discussed the incident on the previous day when “*the Halton switch was run. It was explained that the root cause was a lack of communication, we were told to be on top of our game*” (Q/A 16). He also confirmed knowledge of CROR Rules 105 and 114, relating to stopping for signals and not fouling track. Mr. Utiuzh stated he was not in a position to see the Halton Switch and that Conductor Johnson was protecting the movement when the Switch was run.

[21] The same questions were asked by the Union regarding air brakes and weight. Mr. Utiuzh committed to “*100% compliance with all the rules*” for the future (Q/A 25).

Arguments

[22] The Company argued the Investigation was fair and impartial; that it properly asked the Grievor what happened and gathered information prior to the Investigation and that the Union did not object to this evidence being filed into the Investigation at that time, relying on **CROA 1737**. It noted the Grievor “*operated Engine 7274 and failed to stop short of the Halton switch that was lined against his movement*” (at para. 30); that the Grievor violated CROR Rule 114 and the GOI in doing so; and that its assessment of 20 demerits was just and reasonable, considering all of the factors. It pointed out the nature of the offence was significant, given that “Handling Switches and Derails” was one of the

10 “Life Critical Rules” of the Company; that for this shift the crew specifically discussed an incident the previous day when a crew ran the Halton Switch the day before; and that despite the specific discussion about switches, the Grievor ran the Halton Switch, which was lined against his movement, and ended up foul of the track. While the Grievor was a new employee, it argued he was expected to understand how to perform his job and act in accordance with the rules. The Company argued the Grievor did not attempt to stop early enough and did not put the train into emergency until he was within one car length of the misaligned switch; that this was insufficient which the Grievor ought to have known; that 20 demerits was not excessive, but was progressive and was in line with the severity of the infraction, his discipline history, short tenure, the aggravating factors and the jurisprudence: **AH803**; **3027**; **3654** and this Arbitrator’s decision in **CROA 5026**, where 20 demerits were substituted for a Conductor who violated Rules 115 and 114.

[23] For its part, the Union noted concerns with the Investigation process. The Union argued there was an unfairness with the Grievor’s Investigation process and that the Grievor was “coerced” to write out his version of events. It argued the Investigation was not genuine but perfunctory and partial. It also pointed out the Rail Accident Form was filled out by a manager who was not present, instead of the employees, which it argued “tainted” the Investigation. It also argued the Notice to Appear did not correctly note the rules breached and the Grievor and the Union were “*surprised*” at the Investigation. Alternatively, it argued against the assessment of 20 demerits, arguing that a written reprimand was appropriate. It pointed out that MacMillan Yard is the largest yard in Canada, and that there were approximately 40 tracks where the Grievor was operating. It argued that both the Grievor and his crewmate were very new at their jobs and were still learning the “*ins and outs of running a remote control locomotive and stopping the movements <u>without air brakes</u>*” (at para. 22; emphasis in original). It argued the weight of his movement when combined with the lack of air brakes when coupled with his lack of experience, resulted in the Grievor not being able to properly stop. It argued the Grievor felt he was in control of his movement; that he was not given the total weight of the movement and was not able to judge proper stopping distances without air brakes. It argued that is a “*judgment call*” which is aided by experience. It pointed out the Grievor attempted to stop when he noticed the switch was misaligned but was not able to do so

considering the momentum and the lack of air brakes; that his leading wheels stopped on the switch points, so he had slowed considerably to coupling speed (or 1.5mph).; and that he put the Train into emergency when it was not slowing. It also focused on the Grievor's commitment to be a "safety ambassador" which was made in Winnipeg during training and again at his Investigation. It also argued this was not a significant incident. It distinguished the Company's authorities. Both parties distinguished the authorities of the other in their Reply arguments and provided specific responses to the arguments of the other.

Decision

[24] Dealing first with the Union's arguments regarding the Investigation, the Union has not persuaded me of its arguments relating to the Investigation process. This is not a case where the Grievor was unaware of his own misconduct or where was "*left in the dark*" as to why he was being investigated (as described in **AH725**). The Grievor was not "*surprised*" that he was being interviewed for running through a switch misaligned against him and failing to stop his movement short of that switch. As in **AH725**, in this case the Notice was clear regarding what the Grievor was being investigated for, which was the "*run through switch while working the YTSS30 (Industrial) on October 6, 2023*". The Grievor was well aware of what had occurred and reported it.

[25] It cannot be maintained that the Rail Traffic Form being completed by the manager "tainted" the Investigation. The details of what occurred for this arbitration process have been determined from a review of the individuals involved and not from that form.

[26] I have also reviewed the transcript carefully. There was also no evidence the Investigation was just a "*means to an end to assess discipline*" as argued by the Union; or of "piling on" because the Company referred to rules which the Union argued were superfluous. I cannot agree with the Union that the Investigation was perfunctory. While the Union took issue at the hearing with the Grievor's requirement to write a statement, that issue was in fact not raised by the Union at the Investigation. That would be the opportunity to at least raise an objection with the manner in which the Grievor was asked to fill out that statement and solicit any evidence on whether he was "coerced". That did

not occur. In fact, when he was asked to describe the event, *the Grievor chose to rely on that same statement*. He chose not to provide any further details when asked to describe the incident in his own words. Neither did the Union representative explore any allegations in the Investigation that the Grievor was "coerced" when he asked questions of the Grievor.

[27] The Union cannot raise an issue of coercion without any evidence of coercion. The allegation was never explored during the Investigation in order to elicit evidence.

[28] The Union argued that the shortness of the Investigation was telling. I cannot agree. The Investigation was short because the Grievor chose not to explain – in his own words – what occurred and to instead rely on his previous statement. He did not take the opportunity to explain what occurred, or even to offer remorse or insight into what he did wrong and what he could do better the next time, which may have been mitigating to the Company, in assessing discipline. That was his choice.

[29] Neither can I accept the Union's argument that because discipline was chosen instead of education such as coaching, the Company's actions were not "corrective" and the Investigation process was not fair or impartial. "Corrective" action in a progressive discipline system includes discipline to lead to that result.

[30] Turning to the merits, from a review of the evidence, I am satisfied the Grievor ran the switch at Halton; that this was an outbound switch; and that his actions were culpable. I cannot agree with the Union's characterization of this offence as "technical"; or that because the Grievor "tried" to stop and was able to stop just over the switch; and did not have air brakes, or the required "judgment" to stop, that would excuse his behaviour or serve to lessen his responsibility.

[31] The lack of judgment is not just in controlling this train to stop before the switch, but in failing to realize the switch was not appropriately lined in the first place. Had the Grievor come to that realization earlier, he could have made his attempts to bring the Train to a stop earlier as well, which was argued by the Company.

[32] Turning to the second and third questions in a *Wm. Scott* framework, the Union has argued the "compelling" mitigating factors include the Grievor's lack of experience;

lack of damage to the switch; and the Grievor not knowing the weight of the cars or having air brakes. It argued the Grievor immediately reported the incident and was forthright in the Investigation. It argued no danger to himself or his crew was created and that a written reprimand would be appropriate.

[33] This is not the Grievor's first rules infraction in his year of employment. His record sits at 35 demerits. While I agree with the Union that the lack of any damage is relevant in assessing mitigating factors. The lack of air brakes is not mitigating. As noted by the Union, the lack of air brakes is how yard movements in MacMillan yard are made with belt pack units. The Grievor trained in that yard; he was well aware – or should have been aware – that he had no air brakes. The Grievor was a new employee does not reduce his responsibility for running the switch at Halton. As noted in CROA jurisprudence, employees must hit the ground running after their training, in this industry. The time to learn the "*ins and outs*" of his job is when the Grievor is performing his 60 *training* trips in MacMillan Yard; it is not *after* he becomes a rules qualified employee and is given assignments to move multi-ton equipment in a busy Yard. If the Union has broader issues with the amount of training received by the Grievor before becoming qualified as a Conductor, that is a systemic issue, which is beyond the reach of this Arbitrator.

[34] It is a core aspect of the Grievor's job to be alert to switches lined against him and not to proceed through them if a switch is misaligned. To ask for a signal is not to confirm the switch is properly lined. It is further relevant – and aggravating – that this is a "main line" switch. The fact that running switches is "common place" - as also argued by the Union - is not mitigating. Neither does that serve to reduce the seriousness of an engine being foul of a track due to running a switch.

[35] It is aggravating that the Grievor was involved in a job briefing on the same day that specifically raised an issue with a previous crew running the Halton switch. As noted by his crewmate, the crew was directed to be on the "*top of their game*" that day precisely to avoid a repeat of that situation. The Grievor should have – and did not – confirm that the same switch earlier discussed was properly lined for his movement. While the Union pointed out the Grievor was the only one disciplined, the Grievor was the employee riding

the point and responsible for protecting the movement. There is no evidence of discriminatory discipline.

[36] The Grievor's level of remorse in this case was underwhelming. It would have been more convincing had he shown insight into how he could have avoided this situation. The Grievor also does not have length of service to work in his favour. The Grievor was in a precarious employment situation for a first-year employee. At the time of this event occurring, the Grievor had already been assessed 35 demerit points (20 dm for having a powered on cell phone in the yard; a written reprimand for booking sick after his call time; and 15 dm for failure to complete reporting, upheld in **CROA 5122**).

[37] Under the Brown System, discharge occurs at 60 demerits. The Grievor was more than halfway to that point.

[38] The Union argued this was a "first time" offence for a run through. While a first, less serious offence for an employee would generally attract a lesser penalty, each category of offence is not "*siloed*" for its own progression, such that there are "multiple firsts" for every employee. An employee does not get a "first time" mitigating impact for every particular category of offence. While it is true that *patterns* of behaviour are aggravating, that does not result in first offences for each category of offence being mitigating, in cases where the Grievor *already* has a significant disciplinary record.

[39] The concept of progressive discipline is premised on the "*belief that discipline will better achieve its corrective purpose if penalties are imposed on a progressive basis*": M. Mitchnick and B. Etherington, *Labour Arbitration in Canada,* at pp. 182. is the *entirety* of a Grievor's disciplinary record that is relevant in determining an appropriate progression under a progressive discipline system, to bring home to an employee the importance of complying with rules and procedures.

[40] Turning to the jurisprudence, no two fact situations will ever be the same, but general trends can determined.

[41] **CROA 5059** – relied upon by the Union - is distinguishable. It involved a second incident of a run through switch and a 30-day suspension. In **CROA 4411B**, the issue was whether there was damage to the switch and whether the Grievor was the one who ran

over it. It was found that 15 demerits were reasonable for a run-through switch in violation of CROR 114. In that case, the Grievor did denied he actually ran the switch, and it was found he did so. There is no comment made in that case regarding that Grievor's length of service or disciplinary record, so it is difficult to determine its applicability. In **CROA 2775**, 20 demerits were assessed for a short service grievor with a poor disciplinary record, for the *second* incident of a run-through switch. The Grievor's poor disciplinary record was due to a pattern of lateness and absenteeism, which was called "remarkably negative". In **CROA 4432,** a Grievor was discharged for his second run-through switch. The Grievor in that case had a 7-day suspension for a run-through switch 6 months previously, as well as a further run-through violation, although that was 13 years previous. The Grievor in fact stood at zero demerits at the time of the incident. The Arbitrator substituted 10 demerits.

[42] There were several more recent decisions offered by the parties. In **AH794**, the Arbitrator stated that the measure of discipline for a run-through switch was in the 10-20 demerit range, depending on context (at para. 26), but recognized that "*some situations may warrant a penalty which exceeds the upper 20 demerit point range*" (at para. 13, **AH803**).

[43] **AH725** is another recent decision for a run-through switch. In that case, the Company had assessed 25 demerits for a run-through switch which led to a derailment. The demerits were reduced by the Arbitrator to 15, because 25 demerits were "excessive" for a "*newly qualified conductor's first offence*" (at para. 18). In the case before me, this is not this Grievor's first offence, however there was also no derailment in this case.

[44] The Company relied on **AH803**. In that case, the Company assessed 30 demerits for a run-through switch, which was reduced to 15 demerits. Relevant in that case was that the Grievor received twice the number of demerits as a crewmate; was not the individual protecting the point; and the engineers proceeded through the switch without the Grievor's authorization as there had been a failure of communication. That case is also therefore distinguishable. The Arbitrator reduced the demerits to 15, leaving the Grievor in that case at 55 demerits, just 5 short of discharge .

[45] In **CROA 3027**, the Company assessed 20 demerits. The Grievor failed to observe a switch lined against her movement in time to warn the belt pack operator and the movement crossing into an adjacent track and was involved in a sideswipe collision, causing $140,000 of damages. There is no indication in that short decision of the Grievor's length of service or disciplinary record, so it is difficult to apply that case. In the case before me, there was no evidence of any damage caused by the Grievor's misconduct.

[46] The Company also relied on **CROA 5026**, however that case is distinguishable. In that case, the Grievor "gave up" his responsibility to protect the point and failed to go to the leading locomotive.

[47] Every demerit counts to an individual who is in a precarious employment situation. Upon review of all of the evidence and the jurisprudence, I am satisfied the Company's assessment of 20 demerits for this run through switch was outside the boundaries of what was just and reasonable, in all of the circumstances, including the lack of damage and the Grievor's immediate reporting.

[48] I am prepared to exercise my discretion to vacate that penalty and to substitute discipline of 15 demerits, as just and reasonable discipline for this run-through switch.

[49] The Grievance is allowed, in part.

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

March 6, 2025

CHERYL YINGST BARTEL
ARBITRATOR