SHP 720

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY LTD. (CP)
(hereinafter the "Employer")

AND

UNIFOR LOCAL 101R
(hereinafter the "Union")

RONALD FERNIE SUSPENSION GRIEVANCE

ARBITRATOR:	Tom Hodges
FOR THE EMPLOYER:	Dave Guerin, Director, Labour Relations David Pezzaniti, Labour Relations Officer Shelley Smith, Labour Relations Officer Deanne Cote, Labour Relations Officer
FOR THE UNION:	Brian Stevens, National Representative Nelson Gagne, President Gerard Emond, Vice President, Atlantic Karine Desjardins, Vice President, East Tom Murphy, Former President Derrick James, Former Vice President, East
HEARING:	June 29, 2015
AWARD:	October 18, 2015

AWARD

JURISDICTION

The parties agree that this arbitrator has the jurisdiction to hear argument in this dispute and render a decision accordingly, pursuant to the terms of Rule 29 of the collective agreement.

BACKGROUND

The grievor, Mr. Ronald Fernie, was at the time of the incident in question, on July 16, 2014, a Lead Hand Rail Car Mechanic with over 37 years of service with CP Rail. While effecting a repair to a rail car in Lambton Yard in the West Toronto area, the employer alleged that he neglected to establish the appropriate blue flag protection as required by safety and operating rule. Management discovered the indiscretion and investigated the matter accordingly. The employer imposed a two week unpaid suspension, a measure that was subsequently grieved by the union on behalf of Mr. Fernie.

Similar to a number of recent discipline cases involving other employees assessed with a suspension by the employer this grievance is part of overarching and ongoing dispute between the parties since early 2013, over the employer's recent change in assessment of disciplinary penalties to bargaining unit members. The facts in this case are unique and warrant a significant review of the grievance and the overarching dispute between the parties. The background to the overarching dispute while examined in detail in a previous grievance are also appropriate for review in this case.

The overarching dispute between the parties has resulted in a backlog of several hundred unresolved grievances being generated over the last two years, due in large part to an apparent change in approach by the employer relating to discipline, and the accompanying use of unpaid suspensions as a disciplinary response. The employer has admittedly, previously relied primarily on the Brown System of assessment and accumulation of demerit points as the means of addressing employee misconduct. However, on February 27, 2013, Mr. Guido Deciccio, Senior Vice President for Canadian Operations, wrote to Mr. Tom Murphy, Local 101R President:

> Dear Mr. Murphy and Fellow Employees,
>
> I have previously shared my concerns regarding the handling of productivity and safety issues. I write to you today to inform you of a change concerning the application of disciplinary assessments at Canadian Pacific Railway.
>
> We continue to have preventable accidents and injuries. These incidents can be directly attributed to carelessness and complacency. Numerous employees have become involved in repeat offences.

Since December 1, 2012, there have been 50 run-through switches, 7 movements travel over a derail, 7 failings regarding the proper protection of moving equipment and 28 rule violations. In summary, we have experienced 210 train accidents, excluding crossing incidents, 10 of which are FRA reportable. This is not acceptable. Despite sharing my previous concerns and our increased focus on safety, some employees are unwilling, or unable, to carry out their duties safely and productively. While we are going to further increase our coaching, proficiency testing and train rides to ensure that work is being carried out safely, the mere assessment of demerits has proven to be unsuccessful in bringing about a positive improvement in the accident and injury trends.

Consequently, we have no choice but to begin to use unpaid suspensions as part of our discipline policy to change at risk behaviors.

We will judge each case on its own merits and use suspensions as appropriate. A Director of Labour Relations will contact you to discuss how suspensions will work.

If you have any questions, please do not hesitate to contact me.

Mr. Murphy responded to Mr. Deciccio that same day:

Dear Mr. Deciccio and staff

The union acknowledges receipt of your email and the letter attached that has already been posted in the facilities and we recognize the company's knee jerk reaction as simply that.

In reply to your letter we state the following.

We do not accept the unilateral introduction of unpaid suspensions either in conjunction or independent of the long standing Brown System utilized in the industry and will reserve our right to challenge the imposition of discipline on a case by case basis.

Our members are not complacent on the job.

On the contrary they are working under the stresses of being punished to the extreme and held out of service or fired for the smallest of issues at the whim of every supervisor available.

This is the real issue at hand. Not complacency.

You mention the number of incidents since December 2012.

It is funny how that date correlates significantly with the timelines of heavy handed discipline brought down by the company in its new effort to control the culture of company workers.

This discipline is not acceptable to us as we feel that this endangers our members even further.

> In the meantime, we will continue to support any positive initiatives that will continue to build our members passion for service and reliability.
>
> It is regrettable that once again the company's intentions are to attack our members and employees generally across the organization, rather than get to the real issues like respect and a workplace free from fear and abuse.

During the period of time since this exchange, there have evidently been a significant and unusually high number of unpaid suspensions meted out by the employer to its employees represented by Local 101R. The suspensions and terminations since Mr. Deciccio's February 27, 2013, are part of what is generally regarded as an initiative to change the culture at CP Rail. Some historical background is necessary to understanding the ongoing dialogue between the parties and worth addressing at this point.

CP is currently in its 150th year of operation. Construction of the railway began in 1881 and by 1886 it was a coast to coast undertaking, which it remains to this day. The company underwent a transformative event in May of 2012 with a virtual change out of its Board of Directors driven by the hedge fund Pershing Square Capital Management. Shortly thereafter a new senior management team was appointed

Just over two years ago, a unit train of crude oil that CP had transferred to the short line Montreal, Maine and Atlantic Railway derailed in Lac Megantic, Quebec, killing 47 residents. A comprehensive Transport Canada investigation ensued. While CP denied responsibility for the mishap, the company nevertheless reflected on the catastrophe while emphasising its already determined focus on employee and public safety. Front line management were mandated to improve performance in this regard, and as indicated earlier, disciplinary assessment went on the rise.

The Brown System of discipline originated from Mr. G.R. Brown who worked for a 35 year period between 1864 and 1899 for the Fall Brook Railroad in upstate New York. He began as a telegraph operator and finished as General Superintendent. In 1885 he introduced his disciplinary system of merits and demerits as a replacement for the unpaid suspensions that were the industry practice at that time, believing that the latter represented excessive financial hardship for the penalized employees and their families. Dismissal could still occur if an employee collected 60 or more demerits. The experience in this respect on the Fall Brook line was nationally acclaimed, and the Brown System was adopted by many U.S. carriers. Soon thereafter, Canadian Pacific got on board. Mr. Brown envisioned his system of industrial discipline as corrective, rather than punitive. Bulletins were regularly posted for the benefit of the employees, indicating which workers had received how many merit or demerit marks, and for what

service or infraction. The Brown System of course remains in place to this day on CP subject to the change in the use of suspensions as outlined in the Deciccio letter of February 27, 2013.

It is in this context of significant change in culture and policy direction at CP Rail that this and many other grievances have resulted. It is hoped that this decision and a number of other decisions will serves as the underpinnings to a more expedited arbitration process for resolution of the many other recent grievances.

EMPLOYER POSITION

CP Rail submits that the grievor, Mr. Ronald Fernie, on July 16, 2014, a Lead Hand Rail Car Mechanic while repairing a rail car in Lambton Yard in the West Toronto area neglected to establish the appropriate blue flag protection as required by safety and operating rule as well as the collective agreement. Management discovered the indiscretion and investigated the matter accordingly. The employer imposed a two week unpaid suspension claiming that Blue Flag Protection is a critical safety rule and the violation warrants a severe disciplinary penalty.

In reply to the union's position with respect to the use of suspensions, CP argues that they are a legitimate management right and recognized as a disciplinary penalty in Rule 28. Rules 28.4 and 28.5 of the collective agreement:

> **28.4** When discipline is recorded against an employee, he/she will be advised in writing and will acknowledge receipt. In cases involving the assessment of discipline a copy of the written advice (form 104) shall be supplied to the duly authorized local representative. In the event a decision is considered unjust, appeal may be made in accordance with the grievance procedure starting by an appeal to the officer who issued the discipline. Grievances concerning dismissal, **suspension**, demerit marks in excess of 30 demerits, or demerits that result in dismissal for an accumulation of demerits and restrictions may be initiated at the final step of the grievance procedure (emphasis added).
>
> In cases of dismissals or other termination of employee relationships, the Company shall provide the Regional Vice-President of the union a copy of the advice given the employee along with a letter outlining the reasons upon which the decision to terminate was based. Time limits for progression of a grievance under the provisions of Rule 28.8 shall begin with the date of such advice.
>
> **28.5** If it is found that an employee has been unjustly **suspended** or discharged such employee shall be reinstated with full pay for all time lost. In the event of an employee being otherwise employed pending settlement of his/her case by reinstatement any pay earned will be credited against time lost (emphasis added).

Further, the employer argues that it has gradually blended a demerit and suspension based approach to discipline since early 2013. The employer maintains that it had advised all union representatives of this approach. The suspension based approach has been increasing in consistency since it was first introduced.

The employer argues that this change in approach to the assessment of discipline is justified given that employees work in safety sensitive and safety critical position. These employees work in often unsupervised situations and must be held to a higher level of accountability than in the past. All of these factors including the safety and productivity issues raised in CP's Senior Vice President Deciccio's letter of December 1, 2013, have served to warrant a change in approach to assessing discipline. Recent railway accidents and particularly Lac Megantic have increased the scrutiny under which railways operate and have created a new reality. The employer maintains that there is no written policy regarding assessment of disciplinary penalties. The change is within its management rights and also reasonable to meet a legitimate operational requirements.

The employer states that CP Rail not only must maintain its high standards, but also must continually improve its ability to operate safely. In addition to safety, the employer argues that at the same time there is the need to operate efficiently and productively. CP Rail requires employees in the bargaining unit be accountable for safety, productivity and compliance with company policy. The employer argues that there is a corresponding need for management to investigate, make decisions, determine appropriate discipline and monitor the related progress.

CP Rail submits that it is in a highly safety sensitive and publicly visible industry. Its employees for a substantial part, including the grievor, are directly involved in duties that ensure the safe operation of the railway, the safety of fellow employees and the public. The employees must have the trust and confidence of the employer that they will perform their duties safely and productively. While employee rule or policy violations in another industrial sector are likely to be prejudicial to the employer CP maintains that its shippers and the public are sensitive to the performance and reputation of railway employees in safety sensitive positions. CP Rail therefore maintains that its employees are to be held therefore at a higher standard than in some other industries.

The employer recognized that some exceptions to a suspension-based approach have been applied. In some cases demerits have continued to be used for employees with clear records. Demerits are also used

in situations where an employee still has a significant number of demerit marks remaining on his or her record. For example, CP argues that in some cases a decision was made to "double" an employee's existing demerit marks record. This has been used in situations when an employee had been handled previously for attendance related incidents under the Brown System and before our suspension based approach was utilized in a broader fashion. Moreover, the employer argued that it has also adopted a deferred suspension approach in some cases. CP argues that it continues to have a strong view that each case must be evaluated on its own merits that involve human behavior, an individual's overall record and what policy or rule was violated or not complied with.

The employer argues that since early 2013 all union representatives have been aware of the Company's decision to assess unpaid suspensions as part of its discipline handling and efforts to impress upon employees the importance of rules compliance. The employer maintains that the approach is straightforward. Each case is evaluated based on its own merits following a fair and impartial investigation pursuant to the terms outlined in the respective collective agreements. The employer submits that there is no formal policy, and none is required when deciding on the appropriate level of discipline to be assessed, if any, be it caution, demerits or suspension.

UNION POSITION

The union argues that the grievor, an employee with over 37 years of excellent service was improperly suspended for 14 days. In his long service the grievor had been previously commended on a number of occasions for his safety habits and work performance. The union maintains that the grievor acknowledged his failure to provide Blue Flag Protection on the date in question.

The union took the position that the employer was required by reason of the nature of the allegation to meet a high standard of proof of the facts upon which it relied. The more serious the alleged misconduct and the more serious the penalty, the more stringent the standard of proof that is required to be satisfied. If the employer is to claim a higher standard for employees in a safety sensitive position a higher standard must be applied to employees' rights embedded in the collective agreement and responsibilities of the employer in the assessment of discipline.

The Union argued that the employer had not established just and reasonable cause for such a severe disciplinary response and the response was excessive. It argued that the employer had not met a basic standard for assessment of discipline. In support of this argument, the union referred to *Wm. Scott & Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1976] (Weiler).

The union also argued that the change in approach to the assessment of disciple is a change in policy as noted in Vice President Deciccio's letter in which he states that:

> Consequently, we have no choice but to begin to use unpaid suspensions as part of our discipline ***policy*** to change at risk behaviors. (Emphasis added)

The union argued that the employer's obligation to establish a codified approach to a disciple policy to ensure just and reasonable cause to impose penalties and that the quantum of penalty selected is justified. The union relies on *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson) regarding the obligations for employers in the unilateral imposition of such policies.

The union argued that long established case law in the Canadian railway industry had established the legitimacy of the Brown system of discipline over that of suspensions. The union noted that the Brown system avoided the hardship of an employee being suspended without wages and avoided having the employer being deprived of his services. While not part of the collective agreement the union argues that the employer is bound by the Brown system and cannot abandon it. The union argues that the employer has not established the change in policy sufficient to meet the tests set out in *KVP* supra. The union maintains that the Brown system is clearly understood by railway employees and that the change of policy toward a suspension based system has not properly made employees aware of the change.

The union does not dispute the employer's right to implement workplace policies, but they are subject *KVP* test in *Lumber and Sawmill Workers Union Local 2537 and KVP Co. Ltd.* (supra):

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.

The union argues that the employer has failed to make employees aware of the policy shift resulting in employees not being aware of the severity of discipline which may flow from an alleged rule violation. Further the rule is not being consistently enforced. The union argues that the same offence can result in demerits, deferred suspensions or suspensions of significant duration. The union argues that the use of suspensions is not clear to employees and is not unequivocal.

The union argues that the fairness of the investigation was compromised when the grievor was asked to waive his right under the collective agreement providing for two days notice of the investigation. Rule 28.1 provides:

> **28.2** Except as otherwise provided in this rule, when an investigation is to be held, the employee and his/her duly authorized union representative will be given at least two days notice of the investigation and will be notified of the time, place and subject matter of such investigation. The notice will be in writing, when practicable. This shall not be construed to mean that the proper officer of the Company, who may be on the ground when the cause for such investigation occurs, shall be prevented from holding an immediate investigation.

DECISION

In 2001, CP Rail went through a major metamorphosis when its parent company, Canadian Pacific Limited, spun off its five subsidiaries, and the railway became a publicly traded undertaking in its own right. The company underwent a second transformative event in May of 2012 with a virtual change out of its Board of Directors driven by the hedge fund Pershing Square Capital Management. Shortly thereafter a new senior management team was appointed.

Just over two years ago, a unit train of crude oil that CP had transferred to the short line Montreal, Maine and Atlantic Railway derailed in Lac Megantic, Quebec, killing 47 residents. A comprehensive Transport Canada investigation ensued. CP denied responsibility for the mishap and subsequent cleanup, and that matter is currently before the courts. The company nevertheless took the opportunity to ratchet up its already determined focus on employee and public safety. Front line management were mandated to improve performance in this regard, and as indicated earlier, disciplinary assessment went on the rise.

CP Rail is an undertaking that is national in character, composed of many separate and distinct terminals, or facilities. As such, a plethora of varying cultures may develop, and attitudes toward rule or safety compliance and indeed disciplinary response to violations may differ from location to location. For example, a specific terminal may experience a raft of serious safety infractions over an extended period of

time. The employer in order to fulfill its obligation to employee and public safety may have to somewhat intensify its disciplinary assessment in that location, at least temporarily, to successfully undermine the culture of misconduct that have been previously allowed to prevail. As a result, a given safety violation in that location may draw a sterner response than that for a similar infraction in another terminal. Similarly, an arbitrator may be reluctant to uphold a more severe disciplinary penalty where no unusual number of similar violations were found to exist.

In *William Scott & Co. v. C.F.A.W., Local P-162* (1976), [1977] 1 C.L.R.B.R. 1 (B.C. L.R.B.), the B.C. Labour Relations Board set out a three part test for arbitrators assessing discipline/discharge cases. First, does the Grievor's conduct give rise to some form of discipline. Second, if the answer is "yes", was the discipline issued excessive, having regard to all of the circumstances surrounding the situation. Third, if the answer to question 2 is "yes", then what measure of discipline should be substituted as just and reasonable.

While Chairman Weiler in *Wm. Scott* supra discussed this issue in the context of a discharge case, his findings have been found by arbitrators to be just as applicable in cases of lesser discipline. In determining whether the penalty imposed by the employer was excessive or inappropriate he adopted the findings in *Steel Equipment Co. Ltd.* (1964) 14 L.A.C. 356 at pages 40-41 by noting:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a

> mitigating circumstances; (c) failure of the company to permit the grievor to explain or deny the alleged offence.
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> The board does not wish it to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider.

In *MacMillan Bloedel Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-85 [1993]*, Arbitrator Hope spoke to the principles of mitigation of penalty and progressive discipline:

> The principles of progressive discipline require the fashioning of penalties that will bring home to an employee the seriousness with which particular acts of misconduct are viewed. Here the evidence supports a finding that acts of theft did not invite dismissal. At the least, the evidence disclosed inconsistency in the approach of the Employer to such offences. Hence, in terms of the factors of mitigation contemplated in Wm. Scott & company, the dismissal of the grievor was not "in accord with the consistent policies of the Employer".

In *Livingston Industries Ltd. v. I.W.A.* (1982), 6 L.A.C. (3d) 4 noted Arbitrator [Justice George] Adams articulated his views on the need for corrective discipline in the industrial context. In order to rely on the doctrine of culminating incident, he suggested that the employer must establish that the employee has been given the opportunity to correct the behaviour which is giving rise to discipline:

> It is generally accepted that punishment, in an industrial relations context, ought to be administered on a "corrective" basis. Penalties should be tailored to allow an employee to learn from his or her mistakes subject, of course, to particularly serious misconduct that may justify an employee's immediate removal from the work place. As one author has observed:
>
> Most simply put, the principle of corrective discipline requires that management withhold the final penalty of discharge from errant employees until it has been established that the employee is not likely to respond favourably to the lesser penalty. To draw an analogy from the criminal law, corrective discipline is somewhat like a habitual offender statute. It presupposes that the preliminary purpose of punishment is to correct wrongdoing rather than to wreak vengeance or deter others. Corrective discipline assumes that the employer as well as the employee gains more by continuing to retain the offender in employment, at least for a period of future testing, than to cut him from the rolls at the earliest possible moment.

Arbitrators have consistently held that the accepted view of a disciplinary progression, that wherever reasonably practicable, industrial discipline should be designed to correct and rehabilitate; not simply to

punish and dismiss. However, the presumption favouring a disciplinary progression is not absolute. Indeed, for some offences in some circumstances, the employer's legitimate interests will demand arbitral acceptance of the penalty of dismissal for even a single occurrence. However, implicit in the modern just cause standard is the notion that for most offences in most circumstances, an employer will take the path of corrective discipline prior to resorting to the ultimate sanction of a severance of the employment relationship. Progressive discipline serves parties the purpose of fairness and giving fair warning of the employer's expectations. Second is the equally accepted purpose is correction. Corrective discipline will generally be found by arbitrators to be unjust and unreasonable if a serious penalty is imposed before a less serious one has been used in an effort to correct the behaviour.

I turn now to the employer's recent deployment of unpaid suspension as a means of disciplinary response. It may indeed be accurate that the use of suspensions within CP is a relatively new phenomenon, and that the employer has relied on the Brown System of demerits for a lengthy period of time as its sole means of disciplinary response within its unionized ranks. However, there is no disputing the clear language of the applicable provisions of the agreement, and there has been no evidence presented to this arbitrator of instances during collective bargaining wherein the union sought unsuccessfully to remove the reference to suspension from the clauses quoted below, and were instead forced to detrimentally rely on employer assurances that such a disciplinary imposition would not ever be deployed. As a result, the employer is fully within its management rights to suspend an employee where it deems the circumstances so warrant.

The union has argued that if the employer is to hold its union members to a higher standard due to their employment in a safety sensitive position, an equally higher standard must be placed upon the employer in the assessment of discipline. Unifor submits that a higher standard for the employer is also appropriate given the increased severity of penalties being assessed. The arbitrator finds merit in the rational put forward by the union. Similarly, there is merit to the union's argument that rights contained in the collective agreement requiring specific time limits cannot be ignored. Investigation procedures are designed to ensure the right of an employee to a fair and impartial investigation and violation of applicable collective agreement provisions during the investigation process can result in removal of any discipline.

If a culture of safety rule complacency within the workplace is suspected, and subsequently proven to exist, that situation cannot be allowed to persist. The employer as part of its overarching obligation as a rail carrier must take whatever action permissible to reverse that unacceptable condition.

Regarding the merits of the instant case, the employer in its presentation to the arbitrator cited the findings of SHP 445 and SHP706 as indicative of arbitral support for lengthy unpaid suspensions as appropriate disciplinary response to a blue flag violation. With respect, the arbitrator cannot agree in this instance. SHP 445 dealt with an employee who, already sitting at 59 demerits, committed a (blue) flagging violation that resulted in a 10 demerit assessment, thus vaulting him past the 60 demerit mark and triggering dismissal for accumulation. The arbitrator in that case cited the grievor's long service as well as employer inconsistency in disciplinary assessment for similar infractions, and reinstated the employee, albeit without compensation. While this result naturally took on the superficial appearance of a lengthy unpaid suspension in response to a blue flag violation that happened to act as a culminating incident, the fact remains that that particular infraction drew only a 10 demerit assessment. It is simply incorrect and misleading to attempt to portray it otherwise. In SHP 706, the employee was assessed 40 demerits for failure to provide proper blue flag protection and subsequently conduct the required job briefing. As his disciplinary record already stood at 50 demerit marks, he was dismissed for accumulation. The arbitrator in that case took note of the employee's 24 years of service, the most recent 11 of which had been discipline free, as well as the normal assessment for a blue flag violation being in the realm of 10-20 demerits. In reinstating the employee without compensation, the arbitrator provided the employee with a redemptive second chance to prove his value as an employee. It was not, most emphatically, a lengthy unpaid suspension in response to a blue flag violation.

The arbitrator recognizes the legitimate concerns of the potential for potential loss of life or significant damage to equipment which may result from a Blue Flag violation. Holding employees in safety sensitive positions to a higher standard of accountability is also understandable. At the same time managers conducting investigations can expect to be held to a similarly high standard when disciplinary investigations resulting in suspensions of significant duration are examined at arbitration. Requesting that an employee waive his right under the collective agreement to proper notice of investigation places that employee in an untenable position. Particularly when the investigation may result in a significant suspension or even dismissal. Such a request may be sufficient to result in an arbitrator removing the entire penalty.

As previously noted a Blue Flag violation is among the most serious of rule violations. However, *KVP* supra and *William Scott* supra are at the foundation of assessing the disciple assessed. With respect to KVP, the evidence established that the use of suspensions in such cases has not been consistent. Deferred suspensions as well as assessment of caution letters and demerits have been used for long service

employees. More importantly, the grievor cannot be reasonably expected to have agreed to forego his right to proper notice had he been aware of the potential for such a penalty.

In answering of the first question of *William Scott* supra, the arbitrator finds that some form of discipline is warranted. However, when considering the mitigating factors set out in that decision a number of factors must be noted. The grievor has a long and relatively unblemished record. He acknowledged his error from the outset. The rule violation was isolated and not premeditated. The penalty imposed results in significant financial penalty. Given the grievor's long service and excellent record, it is unlikely that the grievor will repeat the offence.

Based on all of the above, and in the spirit of the findings of the learned authorities cited above, the levy of a two week suspension upon an employee with 37 years of service and a virtually clear work record, albeit as a result of a very serious rules infraction, cannot be considered a fair, reasonable, or progressive response to the matter at hand. The grievance must therefore be allowed in part. His record will be amended to reflect a three day deferred suspension. The grievor will be compensated for any lost wages and benefits resulting from his suspension.

I remain seized should there be any dispute with respect to any aspect of the interpretation, enforcement or implementation of this award.

Dated this 18th, day of October, 2015

Tom Hodges
Arbitrator