AH827

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Railway Company

(CP)

Grievance re R. Brydge 30-day suspension

Arbitrator: Graham J. Clarke
Date: March 31, 2023

Appearances:

TCRC:

K. Stuebing:	Legal Counsel
D. Fulton:	General Chairman CTY West
D. Edward:	Sr. Vice General Chairman CTY West
J. Hnatiuk:	Vice General Chairman CTY West
J. Zahariuk:	Local Chairman – Yard – Winnipeg
H. Makoski:	Vice General Chairman LE West

CP:

C. Clark:	Manager Labour Relations, CP Rail
L. McGinley:	Assistant Director Labour Relations, CP Rail
C. Barnes:	Trainmaster, CP Rail

Arbitration held via videoconference on March 23, 2023.

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement (Appendix 2) revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. On November 4, 2015, CP assessed Conductor Robert Brydge a 30-day suspension for these reasons[1]:

> Please be advised that your discipline record has been assessed with a 30 day suspension from Company service, without pay, from November 4, 2015 to December 3, 2015 for the following reason(s):
>
> For the violation of CROR General Notice, CROR Rule 114, Rule Book for Train and Engine Employees, Section 2, Item 2.1, Sub Item (a)(ii), and Item 2.2, Sub Items (a), (c)(v) & (vi), while working as the YS on Yard Assignment PR22 with your movement running through the west end NCI I switch, in Winnipeg Yard on October 17, 2015.

3. CP argued that the running of the switch, given Mr. Brydge's disciplinary record, justified a 30-day suspension. CP relied throughout its case on 2 separate 21-day suspensions; one in 2013 and the other in 2015, just a few months before the events in this case.

4. The TCRC, which did not contest the events involving the switch, argued that the penalty should either be removed or mitigated by the arbitrator. The TCRC highlighted that Mr. Brydge reported the matter to CP immediately and took responsibility for the incident. Similarly, it noted that the parties had agreed in 2017 to reduce the 2015 21-day suspension to 3 days.

5. For the following reasons, the arbitrator had decided to reduce Mr. Brydge's 2015 30-day suspension to one of 3 days. The arbitrator has also examined the parties' dispute about the proper content of an employee's disciplinary file in the railway sector.

[1] TCRC Exhibits; Tab 6; Form 104

CHRONOLOGY OF FACTS

6. **February 12, 2007**: CP hired Mr. Brydge as a conductor. He had previously worked for CP in the 1970's and 1980's in the Winnipeg Diesel Shops.

7. **October 17, 2015**: Mr. Brydge was involved in a run through switch incident when acting as Yard Service Employee Foreman.

8. **October 28, 2015**: CP obtained Mr. Brydge's Statement[2] about the run through switch. Mr. Brydge did not deny liability:

> Q48 Is there anything you wish to add to this statement?
>
> A48 I regret this incident happened, and I always do my best to follow the rules.

9. **November 4, 2015**: CP imposed a 30-day suspension for the incident.

10. **February 2021**: Mr. Brydge retired from CP.

WHAT DOES MR. BRYDGE'S DISCIPLINARY RECORD CONTAIN?

11. During the March 22-23, 2023 arbitration session in which the parties pleaded 4 distinct grievances, a question arose about the content of employee discipline records in the railway industry.

12. After Day 1 on March 22, 2023, the TCRC wrote to the arbitrator and CP about discipline records:

> There appears to be renewed disputes about what constitutes a proper record—notwithstanding Arbitrator Sims' clear and oft-applied directions at pages 5-7 of CROA Case No. 4621.
>
> As such, in advance of tomorrow's proceeding, the Union encloses Robert Brydge's discipline record as at the time of the October 2015 run through switch[3].

[2] TCRC Exhibits; Tab 5

[3] The TCRC's amended disciplinary record attached to its March 22, 2023 email was an abridged version of the one the TCRC had originally included at Tab 2 of its Exhibits.

13. The arbitrator responded prior to starting the Day 2 arbitrations and asked for the parties' comments on discipline records. The practice in the railway industry differs from what arbitrators usually see in regular arbitrations:

> Thanks for this.
>
> In some cases, perhaps involving other railways, the discipline record consists of "active" discipline and "total" discipline. The parties can explain today when convenient where the various discipline tables being produced come from. Reference to the relevant collective agreement provisions would also be appreciated.

14. The parties addressed this issue during Mr. Brydge's arbitration. The important thing for any arbitrator is to avoid quick instinctive reactions coming from regular arbitration cases. The sophisticated parties in the railway industry have a different way of managing disciplinary records. The arbitrator must focus on the parties' practices. While some railways maintain a record of "active" and "total" discipline, the parties advised that that does not occur at CP.

15. Based on the parties' comments at the hearing and recent cases, the following non-exhaustive list of observations appear to apply to disciplinary records for TCRC members working at CP:

1. The parties' collective agreement (CA) does **not** contain the type of sunset clause that arbitrators routinely see in regular arbitrations.

2. Historically, even though nothing has been reduced to writing in the CA, CP and the TCRC had adopted a practice which applied the Brown System of demerit points. Termination of employment would occur if an employee reached 60 demerit points. However, an employee who had 12 consecutive discipline free months would have 20 demerits deducted from the disciplinary record. Those notations remain on the disciplinary record.

3. Suspensions do not disappear from an employee's disciplinary record. The parties frequently cite in their Briefs an employee's overall disciplinary record, including demerit points and the various instances when discipline-free service resulted in a reduction of demerits[4]. In CROA 4627[5], which involved a different railway, the arbitrator considered an employee's demerit points reductions when intervening to modify the penalty:

> 13. Second, Mr. Norman's discipline record demonstrates that progressive discipline under the Brown System has worked in the past (U-2; TCRC Exhibits;

[4] TCRC Exhibits; Tab 2; Mr. Brydge's Disciplinary Record and TCRC's Brief at paragraph 21.
[5] CROA 4627: Canadian National Railway v Teamsters Canada Rail Conference, 2018 CanLII 43372

> Tab 5). He had 5 periods during his long career when demerit points were removed due to him going discipline free for over 12 months. One cannot refer only to specific discipline over a long career without also giving credit for these 12-month discipline-free periods.

In AH735[6], a case again involving a different railway, both parties reviewed an employee's entire disciplinary history [Footnotes omitted]:

> 17. For multiple reasons, CN urged the arbitrator not to intervene. Speeding always merits discipline but speeding with a Key Train constitutes an aggravating factor. Mr. Bashford's active discipline history already had 55 demerits when the May 29, 2021 Key Train speeding incident occurred. He had already been suspended in February 2021 for a different speeding incident while still sitting at 55 demerits.
>
> 18. CN noted Mr. Bashford's cumulative discipline history had 344 demerit points, 3 suspensions and 2 written reprimands, a record far worse than any other long service employee in the TCRC's bargaining unit.
>
> 19. The TCRC highlighted not only Mr. Bashford's 31 years of service, but also the fact that he did not attempt to deny his responsibility. He admitted his error in judgment since he thought he was further north and still had time to comply with the speed limits. Mr. Bashford also admitted he was "ashamed" that he missed the Key Train zone. In addition, the TCRC noted that 220 demerits of the 344 occurred over 10 years before the current incident.

4. New challenges arose in 2013 after CP gave notice it would no longer follow the Brown System and the use of demerit points[7]. In or about 2018[8], CP adopted a hybrid system of demerit points and suspensions.

5. In their CA, the parties have also negotiated an informal way to handle some incidents. Those incidents cannot be raised at arbitration unless a repeat offence has occurred within a one-year period:

> 39.11 INFORMAL HANDLING
>
> (1) The service record of the individual warranting, for the first offence of a minor nature the case may be handled in the following manner.
>
> (2) In the place of the formal investigation as provided for in the Collective Agreement an informal interview will be held to review the incident involved at which interview the employee may have an accredited representative of the union present.

[6] AH735: Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 6670
[7] See CROA 4549, CROA 4630 and CROA 4600. CP's Brief referenced February 2013 as the date when it first gave the TCRC notice of this change: see paragraph 20 and CP Exhibits; Tab 6.
[8] CP Brief; paragraph 18.

> **(3) A record of the incident will be placed on the employee's file and a copy of same given to the employee.**
>
> **(4) This record on file does not constitute discipline but does establish that the incident took place. The fact that the incident occurred may be used by the Company in assessing the appropriate amount of discipline should repeat offences take place within a one year period.**
>
> **(5) The existence of this record on an employee's file will not be used at arbitration by either party if repeat offences do not take place within one year.**
>
> (Emphasis added)

5. Efficiency tests (ETs) which did not result in discipline do not form part of an employee's disciplinary record for arbitration purposes[9] [Footnotes omitted]:

> 27. CP remained fully entitled to plead that it still had cause for dismissal, despite Arbitrator Hodges overturning Mr. Igbelina's 30-day suspension. But its attempt during the hearing to file more ETs into evidence demonstrated Arbitrator Sims' legitimate concerns. These past ET tests never formed part of Mr. Igbelina's disciplinary record. He had never had a chance to contest them. They cannot be raised at arbitration to support CP's case for just cause.

6. There is a significant difference between an employee's general employment file and a disciplinary record. At arbitration, CP can only refer to discipline properly added to the disciplinary file in accordance with the parties' CA and/or their longstanding, but mostly uncodified, practice.

16. The arbitrator will keep these observations in mind when considering CP's culminating incident argument.

17. In the instant case, CP produced an "Employee Safety Report"[10] (Report) which mixed "Discipline Information", "Testing Information", which presumably means ETs, and "Incident Information". There is nothing wrong with an employer keeping track of information. But, for a railway arbitration, only proper discipline should be included in the Record.

[9] AH811: Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 9152
[10] CP Exhibits; Page 25/97

18. The Report CP produced goes beyond a proper discipline record. For example, despite article 39.11 of the collective agreement, the list of discipline events includes one entry entitled “Informal Handling”. There are also references to “Caution” and “Other”. It was unclear if the parties agreed that all these entries constituted discipline.

19. The TCRC’s amended discipline record[11] differed in that it included 2 separate automatic 20 demerit point reductions[12] and stopped at 2015. CP’s document included discipline up to and including 2020.

20. Parties usually agree on an employee’s discipline record, though this may be easier when the CA contains a negotiated sunset clause. Nonetheless, for railway arbitrations, the parties should ensure in advance that they agree on past discipline or raise it before an arbitrator as a preliminary issue.

21. A related issue for Mr. Brydge’s record comes from a subsequent 2017 penalty reduction to 3 days for the 2015 21-day suspension. The arbitrator has previously considered the impact on an arbitration arising from other matters involving the same employee.

22. In CROA 4521[13], CP objected to the TCRC making reference to two outstanding grievances which did not form part of the record before the arbitrator:

> 5. CP objected to certain evidence the TCRC included in its brief. The TCRC has filed two other grievances on behalf of Mr. Tilford contesting separate 14-day and a 30-day suspensions. Those matters remain pending in the CROA process and were not included in this case. CP argued the arbitrator had no jurisdiction to consider those matters.
>
> 6. The TCRC argued that the arbitrator, within the context of a harassment grievance, could note, for example, that in one of the grievances CP interviewed Mr. Tilford, but not the train’s engineer. That finding in the TCRC’s view did not require the arbitrator to decide the merits of that grievance.
>
> 7. CP countered it was not prepared to deal with the context surrounding a grievance with which the arbitrator was not seized.

[11] See the TCRC’s revised Tab 2 for its Exhibits sent by email on March 22, 2023.
[12] The TCRC referenced a 12-5-2014 20 demerit reduction in its amended Tab 2, something the arbitrator did not find in the earlier discipline records the parties submitted.
[13] CROA 4521: Canadian Pacific Railway Company v Teamsters Canada Rail Conference Maintenance of Way Employees Division, 2017 CanLII 5291

> 8. The arbitrator expressed to the parties some concern with potentially impacting two pending grievances which another CROA arbitrator might hear. Similarly, a Joint Statement of Issue, or an Ex Parte Statement, circumscribes the matters the arbitrator can decide: CROA&DR 3488.
>
> 9. After a short break, the TCRC advised that Mr. Tilford's two grievances would not form part of this harassment grievance.

23. In CROA 4604[14], CP argued that the arbitrator should accept "as is" existing disciplinary measures even though they had been grieved. The arbitrator had difficulty accepting that proposition, as well as the TCRC's suggestion that those events cannot be considered. The parties resolved this impasse by adding the other grievances to the arbitration so that the arbitrator had the grievor's full record available when deciding the case:

> 5. **This matter initially involved only Mr. Stringer's termination grievance. During the December 2017 CROA session, this Office learned that Mr. Stringer's two other pending discipline grievances had not been included**.
>
> 6. **CP argued it could rely on Mr. Stringer's discipline record as it stood, despite the pending grievances**. In CP's view, the TCRC decided which grievances to schedule before this Office. If they did not contest earlier sanctions at the same time as the dismissal grievance, then CP could rely on the existing discipline record.
>
> 7. **The TCRC argued that an arbitrator cannot rely on contested discipline in a culminating incident case**. Moreover, it noted that CP could add other relevant discipline incidents to a CROA hearing.
>
> 8. **Neither party had time to verify the existing arbitral jurisprudence on the issue. The arbitrator advised the parties that, on a preliminary basis, neither position seemed persuasive. Contested discipline pending before this Office cannot be relied upon in arbitration to support a penalty, including dismissal. Such a result would unfairly render the still pending grievances moot**.
>
> 9. **But neither does it appear practical to hear an employee's termination grievance without also resolving related pending matters before this Office. The entire context is essential**. The parties have shown in CROA&DR 4524 that five separate cases involving the same employee can be heard at the same time.

[14] CROA 4604: Canadian Pacific Railway v Teamsters Canada Rail Conference, 2018 CanLII 3924

> 10. The parties successfully resolved the issue. At the December 2017 CROA session, they pleaded Mr. Stringer's dismissal case. At this Office's January 2018 session, they then pleaded the two earlier disciplinary matters.
>
> (Emphasis added)

24. In Mr. Brydge's case, CP argued that it would be unfair for the arbitrator to consider a 2017 settlement pursuant to which the parties had agreed to reduce Mr. Brydge's 2015 21-day suspension to 3 days. CP's discipline record[15] stated the suspension for the 7/7/2015 incident was 3 days, but also included an explanation referencing the parties' "Grievance Resolve".

25. The arbitrator does not agree with CP's position. The arbitrator must apply the discipline found in the grievor's record at the time of the arbitration. In AH811, *supra*, the arbitrator commented on this type of scenario [Footnotes omitted]:

> 19. For several reasons, the arbitrator has concluded that a written warning should be substituted for Mr. Igbelina's termination.
>
> 20. First, on January 16, 2023, AH798 overturned Mr. Igbelina's 30-day suspension on both procedural and substantive grounds. While this occurred just 10 days before this arbitration and may have limited the parties' ability to revisit Mr. Igbelina's situation, AH798 significantly reduced his disciplinary record.

26. As AH811 notes, the arbitrator takes the discipline record as it exists at the time of the arbitration. An arbitrator will not apply the employer's original disciplinary measure if the parties later agree to reduce it. If contested disciplinary measures remain outstanding, then the parties may need to find an arbitrator who will hear them all concurrently, as occurred in CROA 4604.

SHOULD THE ARBITRATOR INTERVENE TO MODIFY THE PENALTY IMPOSED?

27. CP satisfied the arbitrator that Mr. Brydge merited discipline for the run through switch incident. The TCRC did not contest the facts. In its oral argument the TCRC highlighted that Mr. Brydge in his Statement gave a full description of what happened. Moreover, he reported the situation to CP immediately. There was no evidence the incident caused any damage.

[15] CP Exhibits; Page 26/97.

28. Subject to any specific penalty for an infraction that the parties have negotiated in their CA, the *Canada Labour Code*[16] (*Code*) sets out arbitrators' remedial authority for disciplinary matters:

> 60 (2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

29. At arbitration, the parties put forward their best arguments to support their respective positions. The Code then requires the arbitrator to determine i) whether to intervene and, if so, ii) the just and reasonable penalty.

30. The arbitrator has concluded that the suspension CP imposed should be reduced significantly. The arbitrator finds no justification for a suspension of 30-days length, even though Mr. Brydge's disciplinary record is far from pristine.

31. First, as noted above, CP relied on Mr. Brydge's 2015 21-day suspension when it determined the discipline in 2015. CP then argued that the arbitrator should not consider the fact that the parties later agreed to reduce the 21-day suspension to 3 days. As already determined above, the arbitrator must take Mr. Brydge's discipline record as it existed at the time of this arbitration. It is up to CP to re-evaluate the strength of its legal position when later events change information on which it had relied.

32. Second, parties must find cases which contain similar facts, rather than rely solely on cases with penalties comparable to the one imposed on a grievor. The facts in each case are crucial to the analysis.

33. In AH794[17], the arbitrator noted:

> 18. The arbitrator agrees with the TCRC. The imposition of 25 demerits for a recently qualified conductor's first offence appears excessive.

[16] RSC 1985, c L-2
[17] AH794: Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 95947

> 19. It is not enough to rely on previous cases which may have awarded a penalty of 25 demerits for running a switch. The parties must consider the context of each case they put forward since the underlying facts remain crucial to any analysis.

34. The running of a switch merits discipline. But that discipline must reflect the facts of the case and the employee's specific situation. CP's case law did not justify a 30-day suspension.

35. CP relied on Arbitrator Hodge's recent decision which upheld a 45-day suspension[18]. But that decision examined a derailment and damage, two important elements which do not exist in Mr. Brydge's situation.

36. CP also relied on CROA 4411-B[19], but that decision, which involved a run through switch and damage, simply upheld CN's imposition of 15 demerits:

> 9. Given that there is no other reasonable explanation for how the switch was damaged, like the Company, I conclude, on a balance of the probabilities, that the Grievor's train run-through of the switch is likely what caused it to be damaged and that the Grievor is responsible for that damage. I see no reason to interfere with the Company's assessment of discipline of fifteen demerits, which is within the range of reasonable responses (see CROA&DR 2775).

37. Similarly, in CROA 4577[20], the employee had just 18 months service and two prior run through switches when Arbitrator Sims substituted a 60 day suspension for termination. In CROA 4087[21], Arbitrator Picher upheld 40 demerits for a run through switch and resulting damage, but paid particular attention to the short service employee's discipline record:

> There can be little doubt but that during the four years of his employment the Company has applied progressive discipline to attempt to rehabilitate what appears to be recidivism on the part of the grievor in respect of violating operating rules. Given his relatively short service, the Arbitrator can see little basis to conclude that the assessment of forty demerits was unreasonable in all of the circumstances. It may be noted that even an assessment of thirty demerits alone would have resulted in the grievor's termination. That amount would not, in my view, have been excessive given the unenviable record

[18] Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 132552
[19] CROA 4411-B
[20] CROA 4577
[21] CROA 4087

amassed by the grievor, including two prior discharges, in his short four years of employment with the Company.

38. CROA 4411-B and CROA 4577 suggest taking a hand's off approach when discipline falls within a reasonable range. The arbitrator agrees. But CP's imposition of a 30-day suspension, especially considering that it later agreed to reduce the 2015 21-day suspension to 3 days, fell well outside a reasonable range. The most pertinent elements in Mr. Brydge's disciplinary record were the 2013 21-day suspension and the 2015 suspension which had been reduced from 21 to 3 days.

39. Considering the context of this 2015 case when suspensions were the "norm", rather than demerits, as well as Mr. Brydge's proper discipline record, the arbitrator has decided to substitute a 3-day suspension for CP's original 30-day suspension. This determination applies only to Mr. Brydge's situation and should not be taken as a precedent for future cases. The disciplinary landscape has changed since 2018 with the reintroduction of demerit points in a hybrid system[22].

DISPOSITION

40. For the reasons set out herein, the arbitrator orders CP to reduce Mr. Brydge's 2015 30-day suspension to one of 3 days and compensate him accordingly.

41. The arbitrator remits to the parties the issue of this compensation given that Mr. Brydge retired in 2021.

42. The arbitrator remains seized.

SIGNED at Ottawa this 31st day of March 2023.

Graham J. Clarke
Arbitrator

[22] The parties have noted in several recent arbitrations that another arbitrator is considering the reasonableness of the 2018 Hybrid Discipline & Accountability Guidelines to which CP frequently refers.