

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4169**

Heard in Montreal, January 9, 2013

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**EX PARTE**

**DISPUTE:**

Appeal of the assessment of discipline and discharge to Conductor Steven Cawdell.

**COMPANY'S STATEMENT OF ISSUE:**

On February 28<sup>th</sup>, 2012, the Union advanced a Step 2 grievance contesting the Company's June 20<sup>th</sup>, 2011 disciplinary assessment of 30 demerits and subsequent dismissal of Conductor Steven Cawdell for "your multiple, unauthorized, and unwarranted absences from work during the period between January 13, 2011 and June 1, 2011."

The Union alleged that Mr. Cawdell had a bona fide medical condition and that discipline imposed was contrary to the Canada Labour Code, that his absences would not pose an undue hardship to the Company, and that he should have been given consideration under the duty to accommodate provision, and requested that the 30 demerits be removed from Mr. Cawdell's record and that he be reinstated without loss of seniority with wages and benefits. The Company disagrees with the Union's contentions and has denied the Union's request.

The Company also raises a preliminary objection with respect to the allegations contained in the Union's Ex Parte Statement of Issue dated October 12, 2012.

The Company contends that the Union's Ex Parte statement inappropriately expands the scope of the Union's grievance with respect to the alleged violations involved as well as the redress being sought. Specifically, the Company contends that:

- 1) The Union's grievance did not contend that the penalty was excessive and unwarranted in all of the circumstances as cited in their Ex Parte statement,
- 2) The Union's grievance did not allege any breach of the Collective Agreement as cited in their Ex Parte statement,

- 3) The Union's grievance did not allege any breach of the Canadian Human Rights Act as cited in their Ex Parte statement,
- 4) The Union's grievance did not seek interest on any lost earnings as cited in their Ex Parte statement,

The inclusion of these additional items not properly progressed through the last step of the grievance procedure unfairly prejudices the Company's position, is contrary to the Memorandum of Agreement Establishing the Canadian Railway Office of Arbitration and Dispute Resolution, and should be excluded from arbitration.

### **THE UNION'S STATEMENT OF ISSUE:**

On June 20, 2011, the grievor was assessed 30 demerit points "for your multiple, unauthorized, and unwarranted absences from work during the period between January 13, 2011 and June 1, 2011 (culpable and patterned absenteeism); a violation of Canadian Pacific's attendance management Policy, while employed as a Conductor in Fort Steele, BC."

It is the Union's position that there is no just cause for Conductor S. Cawdell's discipline and discharge and that this penalty is excessive and unwarranted in all of the circumstances. The Union contends that the Company's disciplinary action breaches the Collective agreement, the *Canadian Labour Code* and the *Canadian Human Rights Act*.

The Union requests that Conductor Cawdell be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

**FOR THE UNION:**  
**(SGD.) D. OLSON**  
**GENERAL CHAIRMAN**

**FOR THE COMPANY:**  
**(SGD.) M. THOMPSON**  
**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

A. Becker	– Labour Relations Officer, Calgary
M. Thompson	– Manager, Labour Relations, Calgary
K. Sali	– Superintendent, Kootenay Division, Cranbrook
E. Tyminski	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice General Chairman, Calgary
B. Church	– Local Chairman, Cranbrook
S. Cawdell	– Grievor

### **AWARD OF THE ARBITRATOR**

The Company raises a preliminary objection with respect to the processing of this dispute by the Union. Simply put, it submits that the issues which the Union has raised in its ex parte statement of issue extend beyond the scope of the original grievance. The Company maintains that the Union is attempting to engage in an improper expansion of the grievance, which should not be permitted.

The Arbitrator cannot agree. The grievance correspondence placed before me reveals that the Union expressly made reference to the alleged violation of the *Canada Labour Code* within the original grievance letter dated August 8, 2011. Further, a letter of reply at step two from the Company expressly references the grievor's right under the *Canadian Human Rights Act*, to the extent that the Company's labour relations officer comments to the Union's General Chairman "You also contend that the Company should have accommodated Mr. Cawdell in regards to his medical condition." In my view the ex parte statement of issue as framed does not raise any new or surprising issues for the Company and its preliminary objection must be dismissed.

As regards the merits of the dispute, I am not without sympathy for the Company's concerns as to the grievor's attendance record. Prior to the assessment of 30 demerits for the grievor's attendance between January and June of 2011, his record reveals some thirteen prior occasions when he was either counselled, cautioned or disciplined for attendance issues, including excessive absenteeism and missed calls. The record which he presents is one that is clearly problematic from the standpoint of

attendance and absenteeism which, in my view, the Company was justified in its efforts to correct, and ultimately to discipline by the assessment of 30 demerits.

There are, however, mitigating factors which emerge in the instant case. The medical record and documents filed by the Union confirm that the grievor has suffered a chronic sinus condition, a condition which was apparently diagnosed in or about 2006. However it is less than clear to me that the grievor advanced his sinus condition as a basis for accommodation on the part of the Company. While it is arguable, as the Union submits, that the grievor's sinus infection is an issue which should be taken into account in evaluating his attendance record, and it does appear that OHS records did contain some reference to that condition, there was no clear attempt on the part of either the grievor or the Union to ever seek measures of accommodation or relief for him by reason of it in the past. Indeed, as the Company stresses, notwithstanding having attended four investigations since 2006 the grievor never once mentioned his sinus condition as a justification for his attendance problems.

In my view this is an appropriate case for a reinstatement albeit on conditions fashioned to protect the Company's legitimate interests. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. As a condition of reinstatement, however, Mr. Cawdell must agree to be subject to the following condition: for the period of two years following his reinstatement, should he register a rate of absenteeism in excess of the average for his peers, at his location, in

any given quarter, regardless of the reasons for his absence, he shall be subject to termination.

January 14, 2013

**(signed) MICHEL G. PICHER**

ARBITRATOR