

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4170

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 Kevin Dunnebacke.

COMPANY'S STATEMENT OF ISSUE:

On March 6th, 2012, the Union advanced a Step 2 grievance contesting the Company's June 20th, 2011 disciplinary assessment of 30 demerits and subsequent dismissal of Conductor Kevin Dunnebacke for "your multiple, unauthorized, and unexplained absences from work between February 13, 2011 and May 19, 2011."

The Union's grievance alleged that the description of the offense was not accurate, questioned the Company's application of its own Attendance Management Policy, and requested that the Company reconsider and/or remove the discipline imposed and that Mr. Dunnebacke be reinstated. 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 12th, 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 progress any argument contesting that the investigation was not conducted in a fair and impartial manner, 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 seek to have Mr. Dunnebacke made whole for any lost earnings, with interest as cited in their Ex Parte statement,
- 4) 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 February 13, 2011 and May 19, 2011 (culpable and patterned absenteeism); a violation of Canadian Pacific's Attendance Management Policy."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Dunnebacke be made whole.

It is the Union's position that there is no just cause for Conductor Dunnebacke's discipline and discharge and that this penalty is excessive and unwarranted in all of the circumstances. The Union further contends that the Company's disciplinary action breaches the Collective agreement and the Company's Attendance Management Policy.

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

The Company disagrees with the Union's contentions and denies the Union's request.

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

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

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. Able	– General Chairman, Calgary
D. Fulton	– Vice General Chairman, Calgary
G. Edwards	– Vice General Chairman, Revelstoke
L. Daley	– Local Chairman, Revelstoke
H. Makoski	– Local Chairman, Winnipeg
B. Church	– Local Chairman, Cranbrook
K. Dunnebacke	– Grievor

AWARD OF THE ARBITRATOR

Both parties raise preliminary objections in respect of this matter. The Company asserts that the Union's ex parte statement of issue constitutes an expansion of the grievance beyond what was originally placed before the Company. I cannot agree with that assertion. The grievance, in the form of a letter dated July 29, 2011 essentially challenges the just cause of the Company in assessing 30 demerits against the grievor for his attendance problems. It also challenges the conduct of the investigation as being short of the standard of fairness and impartiality. In my view that originating document is sufficiently consistent with the scope of issues described within the Union's ex parte statement of issue. Therefore, there is no basis for the preliminary objection raised by the Company.

Nor am I impressed with the preliminary objection raised by the Union alleging an improper investigation. It draws to the Arbitrator's attention nothing in respect of a flaw concerning the procedure followed by the Company during the course of the grievor's disciplinary investigation. At its strongest, the Union seems to take exception to the fact that the investigating officer expressed doubt about the truth of the statements being made by Mr. Dunnebacke during the course of the investigation. While each case depends on its facts, the fact that an investigating officer may express doubt or seek clarification of an answer does not, in my view, equate to prejudgement or the conduct of an unfair investigation. In my view the standard of a fair and impartial investigation was not violated in the case at hand and the Union's preliminary objection must also be dismissed.

The Arbitrator cannot dispute the Company's concern with respect to the attendance registered by Mr. Dunnebacke. Hired in March of 2004, the grievor has incurred discipline for his attendance on nine separate occasions, in addition to three instances of informal counselling. Among other things, he was assessed ten demerits and twenty demerits for his attendance failings in October of 2009 and January 2010, respectively. During that period his absences placed him in the top fifteen percent of employees for absenteeism. Further, at the time of his discharge his record stood at fifty demerits, none of which were grieved.

The record also discloses a certain carelessness on the part of the grievor with respect to the use of illness as a basis for justifying his absence. For example, he invoked illness as an excuse for attending a hearing test in April of 2011, and did likewise in May of the same year when in fact his absence was due to family difficulties. The Company also questions the truthfulness of the grievor's accounts of illness, particularly taking issue with his suggestion that he experienced sun stroke following a snow mobile excursion, given the partially cloudy conditions and the fact that the grievor was fully clothed. The Company also questions the frequency of the grievor's absences coinciding with scheduled days off and vacations.

Having reviewed the evidence I am satisfied that the Company did have basis for assessing discipline against the grievor, and that given his record, 30 demerits was not inappropriate. However, I am also satisfied that the overall circumstances would merit

the grievor being given a last chance to demonstrate his ability to record a responsible rate of attendance at work.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost. Mr Dunnebacke's reinstatement shall be conditional on his accepting to be subject to the following condition: for a period of two years following his reinstatement he shall be required to record a rate of attendance at work equal to the average of his peers at his location. Failure to meet that standard, for any reason, during any quarter of that period shall be grounds for his termination.

January 14, 2013

(signed) MICHEL G. PICHER
ARBITRATOR