

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4230

Heard in Montreal, July 11, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 25 demerits on September 2, 2011 and March 4, 2012 to Locomotive Engineer Kelly Lutes, resulting in his dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

In the course of 2011 and 2012, Locomotive Engineer Lutes was assessed 25 demerits on two occasions as follows. On September 2, 2011, following an investigation, Mr. Lutes was assessed 25 demerits "for your excessive and pattern (weekend) absenteeism, inappropriately missing calls, inappropriately booking sick when denied a LOA; inappropriately booking sick while at the away from home terminal, inappropriately booking unfit before and/or after an earned days off or annual vacation, and for conduct unbecoming an employee as evidenced by your refusal to follow the instructions of a Company Officer, specifically when instructed to contact your Manager upon your arrival back at the Horne terminal, all of which occurred during the period between January 24, 20 11 to July 31,2011 while employed as a Locomotive Engineer at Medicine Hat, Alberta;"

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 assessment of 25 demerits is null and void and ought to be removed in its entirety. The Union further contends that the assessment of 25 demerits is unwarranted and unjustified in the circumstances, including that the Company had previously addressed the alleged infractions that had formed the basis for discipline on September 2, 2011, and that the assessment of discipline breaches the Company's duty to accommodate under the *Canadian Human Rights Act*, the *Canadian Charter of Rights and Freedoms*, the *Canada Labour Code*, and the Collective Agreement. The Union requests that the 25 demerits be removed from Mr. Lutes' record and that the Grievor be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

On March 4, 2012, following an investigation, Mr. Lutes was assessed 25 demerits "For failure to be available for duty as evidenced by your missing calls for work on December 25th, 2011 and January 28th, 2012, while employed as a Locomotive Engineer at Medicine Hat, Alberta." His employment was subsequently terminated by the Company for accumulation of demerits. The Union contends that the termination of Mr. Lutes' employment is unjustified, unwarranted and

excessive and in violation of the Collective Agreement. The Union requests that Mr. Lutes 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.

The Company disagrees and denies the Union's requests.

FOR THE UNION:
(SGD.) D. Able
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

A. Becker	– Labour Relations Officer, Calgary
R. Hampel	– Counsel, Calgary
D. Freeborn	– Director, Labour Relations, Calgary
M. Chernenkoff	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
G. Edwards	– Vice General Chairman, Revelstoke
D. Able	– General Chairman, Calgary
D. Becker	– Vice General Chairman, Medicine Hat
J. Cooper	– Vice Local Chairman, Moose Jaw

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that the grievor has registered a high rate of absenteeism which the Company characterises, correctly, in my view, as “pattern (weekend) absenteeism.” He was assessed twenty-five demerits on August 31, 2011 for his recurring absenteeism between January 21 and July 31, 2011 and received a further twenty-five demerits on March 4, 2012 relating to the same problem in the period between December 25, 2011 and January 28, 2012. The total of fifty demerits assessed against him resulted in his dismissal for the accumulation of demerits under the Brown system.

Upon a close review of the material, I am satisfied that there was a degree of fault on the part of the grievor. The pattern of his conduct reflects that he demonstrated a tendency to book unfit before and after earned days off or annual vacation, that he missed a call prior to an earned day off, that he had booked unfit when he had been denied a

personal leave and that all of the occasions upon which he booked fit were contiguous to a weekend or an earned day off.

The record confirms that the grievor is a long term employee, first hired in 1978, and that he is close to his retirement entitlement. While the Arbitrator does not dispute the Company's characterization of the extent of the grievor's disciplinary record, said to be among the least impressive of all unionized employees, I am not persuaded that there is not some room for giving the grievor an opportunity to improve his record in what would be the time remaining before his eligibility to retire. A further mitigating factor of some value, in my view, is the fact that Mr. Lutes' absences have been, to some degree, contributed to by a chronic medical condition of which the Company appears to have been aware.

In the result, the grievance is 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. The grievor's reinstatement shall be conditioned upon his accepting to maintain a rate of attendance equal to the average of his peers at his terminal for the period of two years following his reinstatement. Should he fail to meet the average in any quarter during that time his employment shall be subject to termination with recourse to Arbitration only on the issue of the calculation of the grievor's absenteeism and that of the average for his peers.

July 12, 2013

MICHEL G. PICHER
ARBITRATOR