

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4369

Heard in Montreal, February 12, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of the assessment of discipline and discharge to Conductor D. Hatley.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant dispute involves three assessments of discipline resulting in the discharge of Conductor Danny Hatley for accumulation of demerits.

First Assessment of Discipline - 30 Demerits:

Following an investigation, on March 12, 2013, Conductor Hatley was assessed 30 demerits "For failing to fulfill your contractual obligation to Canadian Pacific as evidenced by your repeated absences from active service by booking sick during the period of February 12, 2012 to February 12, 2013. You were off sick or unfit on 16 occasions and missed a total of 40 days and three missed calls. All instances were culpable absenteeism and constitute a failure to comply with the Canadian Pacific Attendance Management Policy for Running Trades Employees, September 2012."

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 Hatley be made whole. The Union contends that the penalty assessed is unwarranted, unjustified and excessive in the circumstances.

Alternatively, the discipline assessed to Mr. Hatley while off on a bone fide medical condition is contrary to the Canada Labour Code as well as the Canadian Human Rights Act.

The Union requests that the discipline assessed be removed from Mr. Hatley's employment record and that he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

Second Assessment of Discipline – 20 Demerits:

Following an investigation, on May 30, 2013, Conductor Danny Hatley was assessed 20 demerits "For your failure to inspect train 100-07 while waiting in the siding at Herbert, SK on the Swift Current Subdivision while on train 853-007 on April 8, 2013. A violation of CROR

General Notice, CROR General A (i), (iii) & (vi), CROR 106, CROR 110 and Failure to comply with Information Bulletin S-166-12 Incorrect or No Delay Reporting within CMA.”

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 Hatley be made whole.

The Union further contends that there is no cause for discipline in the circumstances and the penalty should be removed altogether from Conductor Hatley’s employment record. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union’s request.

Third Assessment of Discipline 30 Demerits and Dismissal for accumulation:

Following an investigation, on September 9, 2013, Locomotive Engineer Trainee Danny Hatley was assessed 30 demerits “Failing to ensure your movement had proper authority to enter the main track on two occasions at Belle Plaine on the Indian Head Sub on July 29, 2013 while you were working train K-33-28. A violation of CROR General Notice, CROR General Rule A (i), (iii), (iv), (vi) and (x), CROR 34, CROR 35, CROR 106, CROR 403.1, CROR 439 and CROR 573 (b)” Locomotive Engineer Trainee Hatley’s employment was subsequently terminated for accumulation of demerits.

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 Locomotive Engineer Trainee Hatley be made whole. The Union further contends that the penalty assessed is unwarranted, unjustified and excessive in the circumstances.

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

The Company disagrees and denies the Union’s request.

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

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|------------|--------------------------------------|
| B. Medd | – Officer, Labour Relations, Calgary |
| M. Jackson | – Superintendent, REvelstoke |
| N. Hasham | – Legal Counsel, Toronto |
| J. Class | – Trainmaster, Moose Jaw |

There appeared on behalf of the Union:

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|--------------|------------------------------------|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| R. Finnsen | – Vice General Chairperson, Wynard |
| W. Zimmer | – Local Chairperson, Moose Jaw |
| J. T. Hatley | – Grievor, Chellewack |

AWARD OF THE ARBITRATOR

1. Conductor Hatley began his employment with the Company on January 5, 2004. He was dismissed because he reached 80 demerits after three instances of misconduct: 30 demerits for attendance issues; 20 demerits for a failure to inspect; and 30 demerits for a failure to stop, and moving forward without authority, on two occasions. After the last incident he was subjected to a drug and alcohol test. He failed the oral swab test suggesting impairment at the time from drug use. The consequences of that positive test are not before me directly because they do not form part of the reasons for the Grievor's termination.

2. Over the Grievor's relatively short career with the Company (2004 to 2013) he accumulated a total of 145 demerits. On October 22, 2009 the Grievor, the Union and the Company concluded what was effectively a last chance agreement as an alternative to his dismissal at that time. His discipline was set at 55 demerits.

3. Thereafter the Grievor worked his way down from 55 demerits to no demerits at the start of the discipline that has now led to his dismissal. It appears that, as a result of the Grievor's clearing the 55 demerits, the terms of the last chance agreement fell away.

The First discipline

4. The Grievor has a history of poor attendance at work for which he was counselled or cautioned:

- August 8, 2005 - Caution for not accepting 3 calls for work (AOR)

- October 4, 2006 - 15 demerits for weekend pattern absences
- April 27, 2007 - Caution for weekend pattern absences (AOR)
- November 13, 2007 - 20 demerits for booking off on call on 2 occasions
- September 5, 2008 - Caution for missing a call (AOR)
- September 22, 2009 - Informal handling for absenteeism
- April 28, 2011 - Informal handling for excessive absenteeism - 11 absences.

5. The Grievor was therefore aware of his obligation to attend work regularly and reliably. He was excessively absent in the period February 12, 2012 to February 12, 2013, on 16 occasions for a total of 40 days off work. The investigation into his absences shows the Grievor giving an array of reasons for his absences, including 'flu, stomach 'flu, common cold, unprepared for duty, dealing with a sick child, migraine headaches, medical condition, personal issues and gout. The Grievor also missed two calls. He explains he did so through once leaving to attend to his daughter urgently, forgetting his phone at home, and on the other occasion leaving his phone in the house while shoveling.

6. The Union takes issue with the long period of assessment of the Grievor's absence record – a period of a year. The Union suggests that concerns over the Grievor's absence record ought to have been addressed in a more timely manner so that he could have responded readily to questions on specific absences.

7. The Union also criticizes certain questions put by the investigating officer during the investigation that led to the Grievor's discipline for poor attendance. I agree that certain of the questions the Union refers to were argumentative and so inappropriate for fact-finding, but the inclusion of those questions did not invalidate the investigation.

Those questions can be struck from the investigation record without vitiating the whole investigation.

8. The Grievor has had a poor attendance record over a long period of time, and he had extensive informal cautions and counselling to address his poor attendance prior to the period for which he was disciplined. His attendance record was certainly cause for concern by the Company, particularly as it is not evident the Grievor suffered from a chronic condition that might explain the absences.

9. In dealing with the absences, and disciplining the Grievor, the Company seems to have conflated culpable with non-culpable absenteeism. All of the instances of absence, save for the two missed calls, seem to have been absences occasioned by some illness or unfitness for duty. Those absences are customarily dealt with under an attendance management program. A review is made of the absences over a period of time. If the employee concerned does not meet the expected standard, without some evidence of a chronic condition, then likely the employer places the individual on terms of attendance, such as occurred for the Grievor in the last change agreement on October 22, 2009. In that agreement, the Grievor accepted that: "attendance at work must be maintained at a rate not less than the average for the employees at his location". His attendance was to be reviewed monthly, and if he failed to maintain the standard his employment would have been terminated. That is the kind of agreement that is appropriate for addressing persistent innocent absenteeism, in the absence of evidence of a chronic condition.

10. The kinds of absences for which the Grievor received the 30 demerits, besides the missed calls, were of the sort that should have been dealt with under the Company's attendance management program, as described. They are not the kind of absences for which an employee can be disciplined because they appear to have been the consequence of genuine incapacity, and so are non-culpable absences (**CROA 3921, CROA 3639, CROA 4340**).

11. There appear to have been two instances included in the list of absences that were not innocent, for which the Grievor might have been disciplined. Those were the missed calls. But there are two problems with disciplining the Grievor for the missed calls. The first is that, at the time they occurred, the Company did not treat them as culpable, but rather as examples of poor attendance along with the innocent absences. The second, as the Union maintains, is that no disciplinary action was taken for the missed calls within a reasonable period of time of their occurrence. The first missed call was in October 2012, the second in December 2012, and the Grievor was disciplined for the absences (including the missed calls) in March 2013. That is too long a gap. An individual must be able to respond promptly to allegations of misconduct.

12. So, there was nothing precluding the Company from disciplining the Grievor for the missed calls at the time they occurred, and perhaps for other absences, so long as they were treated as culpable absences at the time and addressed in that manner then. That did not occur. Instead, as I have said, the Company treated all of the absences

(and the missed calls) as deficiencies in the Grievor's attendance, for which he could not be disciplined unless he had been specifically put on terms of attendance that he had failed to meet.

13. In the circumstances, the Company was not entitled to issue the 30 demerits to the Grievor in March 2013 for his poor attendance in the previously 12 months. That discipline is set aside.

The Second discipline

14. The Grievor's second offence was the result of an alleged breach of CROR No. 110, a failure to perform a pull-by inspection of a passing train. Rule 110(a) reads:

(a) When duties and terrain permit, at least two crew members of a standing train or transfer and other employees at wayside must position themselves on the ground on both sides of the track to inspect the condition of equipment in passing trains and transfers. When performing a train or transfer inspection, the locomotive engineer will inspect the near side. When a group of wayside employees is present, at least two employees must perform the inspection.

15. The Union takes issue with the notice of investigation the Grievor received prior to the investigation that resulted in his second discipline. The Union says there was insufficient specificity of the alleged misconduct to enable the Grievor properly to prepare himself for the investigation. The Union submits that, as a consequence of the inadequate notice of the investigation, the investigation was not conducted in a fair and impartial manner and the discipline that resulted should be set aside.

16. A notice of investigation must inform the employee “in advance of the precise conduct or event which will be the subject of the investigation that may result in their discipline” (*Ad Hoc 521*).

17. The Grievor was advised that the investigation was “in connection with: Your tour of duty on 853-007 at Herbert, SK on April 8, 2013”. On that date, Trainmaster Jeff Closs was at the Herbert siding, performing efficiency testing. He immediately called the crew on the radio and asked whether there was any reason why a pull-by inspection was not performed. The Grievor replied, “not in particular”. The Grievor was advised then that the failure to inspect would be addressed formally. Therefore, when he received his notice of the investigation he was quite aware of what it entailed.

18. I conclude that, in the circumstances of this investigation, the Grievor was sufficiently aware of what he faced and of what explanation was required of him in order properly to prepare himself.

19. On the merits, the Union submits that the exception in CROR No. 110, “when duties and terrain permit...” applies to the situation in which the Grievor found himself. The Union argues that the terrain was such as to not permit a safe opportunity for the pull-by inspection. The parties produced photographs of the scene where the inspection would have taken place. They show that the north side of the track was likely unsafe to perform the inspection, but that was not so on the south side. There the terrain was sufficiently accessible and stable for the Grievor to have done the pull-by inspection

near the signal box. In the circumstances, the inspection ought to have been done. The Company's discipline to the Grievor of 20 demerits was reasonable.

The Third discipline

20. The Grievor's third discipline was for the Grievor failing to ensure his locomotive movement had the proper authority to enter and operate on the main track, on two occasions on July 29, 2013. He did not have authority to enter the controlled locations. These incidents violated CROR No. 573(b). The Grievor was unaware of the violations at the time. The explanation for the Grievor's failures is that the stop signal was low down, a dwarf signal, close to the ground, and difficult to see from the locomotive cab. The Grievor said the PTC console detracted from his full view of landmarks around him, including the adjacent tall mast signal. The Union suggests this is a mitigating factor. The Grievor was focused on the switching operations and so he missed the stop signals. His action created a safety risk, a potentially serious one. The Grievor was issued 30 demerits for his cardinal rule infractions. Given that there were two rule violations, this discipline is within the range of reasonable responses by the Employer **(CROA 2952, CROA 4249)** and should not be disturbed.

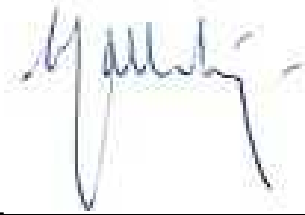
Conclusions

21. I have set aside the first discipline. This means that the accumulation of demerits for the remaining two disciplinary sanctions brought the Grievor's total to 50. This would not automatically result in his dismissal from the Company's service under the Brown System of Discipline. In the ordinary course the Grievor would be reinstated in

employment with compensation and without loss of seniority. However, I understand that the Grievor was drug tested immediately after the last instance of misconduct. The mouth swab test was apparently positive of drug use. That likely showed impairment at work. Since that matter is not before me and remains to be dealt with, I make no remedial order on the matters before me, other than as above.

22. In all the circumstances, the grievance is partially upheld.

March 4, 2015



CHRISTOPHER ALBERTYN
ARBITRATOR