

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4421

Heard in Montreal, October 16, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Conductor Craig Cleroux.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following investigations, on January 10, 2015 and January 23, 2015 Conductor Cleroux's employment was terminated by the Company for alleged conduct unbecoming in respect of alleged failure to follow two familiarization schedules, alleged failure to respond to correspondence in a timely manner as well as in respect of time claims submitted during his familiarization.

The Union contends that there is no cause for discipline in the circumstances. The Union notes that Mr. Cleroux's outright dismissal is fundamentally discriminatory when contrasted with the Company's treatment of fellow employees. In the alternative, that the penalty of discharge is excessive and unwarranted.

The Union requests that Mr. Cleroux 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 request.

FOR THE UNION:

(SGD.) B. Hiller

General Chairman

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

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|----------------|---|
| B. Scudds | – Assistant Director, Labour Relations, Toronto |
| J. Bairaktaris | – Director Labour Relations, Calgary |
| D. Elen | – Assistant Superintendent, Toronto |
| L. Burnett | – Support Services, Toronto |

And on behalf of the Union:

- | | |
|-------------|--|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| B. Hiller | – General Chairman, Toronto |
| W. Apsey | – Vice General Chairperson, Smiths Falls |
| C. Cleroux | – Grievor, Smiths Falls |

AWARD OF THE ARBITRATOR

This arbitration concerns Conductor Craig Cleroux’s (“the grievor”) discharge on January 26, 2015. At the time of discharge, the grievor had approximately seventeen years service with Canadian Pacific Railway (“the Company”). His disciplinary record was demerit free with two cautions.

In November 2014, the grievor bid on and was granted a temporary move to Toronto to commence a 91-day tour. The grievor’s colleagues, Al Ford (“Ford”) and Shane Taylor (“Taylor”) were also granted the same temporary move.

The “conduct unbecoming” for which the grievor was discharged is described in seven bullet points referenced in Form 104. I have reduced the bullet points to five for ease of reference and address each in turn below. The grievor is alleged to have:

- failed to follow the familiarization schedule provided by Ms. Lore Burnett, Coordinator Support Services (“Burnett”) on November 18 and November 30, 2014;

- failed to respond in a timely manner to correspondence from Burnett and Mr. Doug Elen, Assistant Superintendent Elen (“Elen”) between November 18 and December 23, 2014;
- failed to respond to voicemail messages left by Elen between December 5 and December 7, 2014;
- carelessly made duplicate time claims on November 22, 2014 and December 18, 2014; and
- left work without authorization while familiarizing on an assignment on December 12, 2014.

Alleged Failure to follow Familiarization Schedules

The record reveals that Burnett provided the grievor (and his colleagues) familiarization schedules on November 18 and November 30, 2014. Throughout the familiarization period there were logistical problems experienced by the grievor, Ford and Taylor. They shared some of their concerns and frustrations with each other. Their respective difficulties were also shared with the Company when all three provided statements during the grievor's investigation.

Specifically on the issue of the familiarization schedule provided to the grievor on November 18, 2014, the grievor was unable to read the schedule on his phone. Ford was also unable to access his schedule. Burnett was away on vacation and not available to the grievor. In addition, Elen’s voice mail box was full when either the grievor or Ford tried to contact him by phone and leave him a message. Both the grievor and Ford took the initiative, to create and follow their own familiarization schedules.

Burnett provided the November 30, 2014 familiarization schedule to the grievor and to Ford in a different format, as by then she had been made aware of the difficulties accessing the first one. Both the grievor and Mr. Ford were able to retrieve and access their respective schedules. Ford followed the schedule, whereas the grievor chose not to do so. Instead, he created his own familiarization schedule for a second time.

The Union points out that Ford was not subject to discipline for his decision to self familiarize with respect to the November 18 schedule. It contends, therefore, that no discipline should be meted out to the grievor. The Union also relies on the Company's decision not to discipline Mr. Lackey (who, in a similar position to the grievor, Ford and Taylor had been familiarized after the grievor's dismissal). Lackey misread a shift on the schedule the Company had sent to him, immediately sent an email apologizing for his mistake, and specifically communicated his need for additional familiarization, with which the Company had no apparent difficulties.

Ford's circumstances of are analogous to those of the grievor with respect to the November 18, 2014 schedule. Lackey's situation, as described above, was not analogous to the grievor's. It would be inequitable for any discipline to be sustained against the grievor for his failure to follow the November 18, 2014 schedule, when none was assessed against Ford for the same behaviour.

A review of the record reveals that the grievor had previously experienced some latitude in setting his own familiarization schedule in 2011 when he had transferred to Smith Falls. I also accept the Union's comment that self-directed familiarization is not uncommon when an employee moves from one territory to another. None of this detracts from the fact that in this case, the grievor (and his colleagues) were very much aware of what the expectation was, however, the grievor, and only the grievor, had a plan of his own and chose to ignore the schedule he knew he was expected to follow. That behaviour is culpable.

Failure to respond in a timely manner to correspondence from Burnett and Elen between November 18 and December 23, 2014.

Failure to respond to voicemail messages left by Elen between December 5 and December 7, 2014.

The first allegation is a general one. It is not my intention to review all of the email correspondence as it relates to it. I have reviewed the record carefully and there is no indication of a failure on the grievor's part to respond to correspondence in a timely manner during the first two weeks of the grievor's familiarization period. In fact, there is every indication of timely communication on several issues once Burnett returned from vacation. Undoubtedly, the grievor could have provided the specific information about his self initiated familiarization schedule sooner, as requested by Burnett, however, it was provided in a reasonably timely manner and within the timeline requested by the Company (December 2, 2014). In any event, there is little evidence before me of Company correspondence in December 2014 that required a response from the grievor.

The next allegation relates to an allegation of failing to return voice mail messages between December 5 and December 7, 2014. On December 5, 2014, Elen tried to call the grievor and left him a message that he wanted to speak with him. He received a text back stating "Sorry I am busy" then, "Call back later" then, "I am in class." The grievor never did call Elen back. Over the weekend Elen left the grievor a message that he was putting him on the spare board, thereby removing him from the familiarization program. The grievor denies ever receiving the voice message and continued with his self-scheduled familiarization tours.

I find it more likely than not, in all the surrounding circumstances, that the grievor was avoiding responding to Elen's phone call of December 5, 2014, of which I have no doubt he had received. At that point, the grievor knew that the Company knew he was not following the November 30 schedule, but he continued with his own self-scheduled familiarization. Therefore, I need not decide if the grievor received Elen's weekend message.

The grievor carelessly made duplicate time claims on November 22, 2014 and December 18, 2014;

The duplicate time claims made for November 22, 2014 were put to the grievor during the investigation. There is nothing before me to suggest that the error was anything other than inadvertent, contrary to the Company's suggestion in its brief. With respect to the claim made for December 18, 2014, there was no actual duplicate claim

made. The December 18, 2014 claim was for a self-scheduled familiarization taken in Streetsville and the other was for December 19, 2014, authorized by Elen on the West Tower. The grievor simply inputted the date incorrectly for the tour on December 19, 2014.

The grievor left work without authorization while familiarizing on an assignment on December 12, 2014;

On December 12, 2014 the Company asked the grievor why he had submitted only a half-day claim. The grievor explained that he had only worked a half a day. The grievor acknowledged that he had left without informing a supervisor when it became apparent that there might not be any more work available that day.

Summary

The grievor engaged in culpable conduct when he took it upon himself to pursue his own familiarization schedule in the face of the one he had received on November 30, 2014, and when he failed to respond to Elen's voice message of December 5, 2014, but instead continued to ignore the assigned schedule of familiarization. A thorough review of the investigation statements, including those of his colleagues, also reveals that he was less than forthright in all respects with the Company. However I am also persuaded, having regard to the totality of the material before me, that the Company has subjected the grievor to unwarranted scrutiny, and that it has done so previously.

While I do not condone the grievor's misconduct, I find that the termination of an employee with seventeen years' service in the circumstances described above is clearly excessive.

This grievance must be allowed, in part. I direct that the grievor be reinstated to his employment forthwith with no loss of seniority, and that he be compensated for all wages and benefits lost. The substituted discipline of twenty demerits shall be placed on the grievor's record. The first and third bullet points are to be removed from the grievor's Form 104.

October 28, 2015



**CHRISTINE SCHMIDT
ARBITRATOR**