

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4441

Heard in Toronto, January 12, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of the outright discharge of Conductor Bill Lind of Cranbrook, BC.

JOINT STATEMENT OF ISSUE:

Following 3 investigations, on November 18, 2014 the Company dismissed Mr. Lind which was described as;

“For conduct unbecoming an employee of Canadian Pacific Railway as evidenced by your;

1. Disrespectful and rude behavior towards Adam Smith on October 25, 2014, which resulted in a delay to the south way freight, V66-25;
2. your abuse of the "booking unfit" privilege on October 28, 2014, in circumstances where:
 - a. your stated reason for "booking unfit" ought to have been reported as "sick" and subject to medical verification, which you did not do; and
 - b. you were found to be engaged in physical labour-intensive activities outside the workplace;
3. your submitting a false and/or fabricated complaint of harassment against Adam Smith on October 25, 2014 for the ulterior purposes of
 - a. avoiding the consequences of your own behaviour on October 25, 2014 towards Mr. Smith; and
 - b. taking time off work to perform personal yard work, when you were not otherwise entitled to do so."

The Union contends that the investigation(s) were 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 Mr. Lind be made whole.

The Union submits that Mr. Lind was disciplined for booking unfit, which the Company is not at liberty to assess discipline for and is contrary to the Collective Agreement (Kaplan Award).

The Union asserts the Company failed to properly investigate Mr. Lind's formal harassment complaint, resulting in a biased and unfair handling contrary to the Canada Labour Code and Company policy.

The Union contends that the Company has failed to meet the burden of proof necessary to justify formal discipline in the circumstances. In the alternative, it is the Union's position that the penalty of termination is excessive and contrary to the arbitral principles of progressive discipline. As a result, the discipline assessed to Mr. Lind is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. Additionally, the Union asserts the discipline assessed violates the Collective Agreement, the Canada Labour Code as well as Company Policy. Accordingly, the Union requests the discipline be removed from Mr. Lind's employment record, and he be made whole for all loss associated. 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:

J. Bairaktaris	– Director, Labour Relations, Calgary
B. Scudds	– Assistant Director, Labour Relations, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Senior Vice General Chairperson, Calgary
R. Finnon	– Vice General Chairperson, Wynyard
J. Smoroden	– Observer, Cranbrook
B. Lind	– Grievor, Cranbrook

AWARD OF THE ARBITRATOR

The Grievor is a conductor who has worked for the Company for thirty-three years. He was discharged for three incidents: (i) disrespectful and rude behavior towards a manager resulting in a delay, (ii) improper use of booking unfit, and (iii) submitting a false and or/ fabricated harassment claim.

The circumstances giving rise to these disciplinary penalties began on October 25, 2014 when the Grievor and his crewmate, Locomotive Engineer Smoroden arrived at their home terminal in Fort Steele, B.C. They were told by Assistant Trainmaster Bailey upon arrival at Fort Steele, that they had to “run long” through Cranbrook. The two gentlemen were surprised by this instruction as they had not been advised of such prior to their arrival at their home terminal and, as such, they considered the request to be a violation of the Collective Agreement. The crew expressed their concern to Assistant Trainmaster Bailey. It was their understanding that they were not required to perform the additional service under the Collective Agreement provisions; specifically that the crew had to be notified before arrival of the requirement to run long. Assistant Trainmaster Bailey telephoned Assistant Superintendent Smith for clarification. Both the Grievor and the locomotive engineer spoke to Assistant Superintendent Smith on the phone for a combined total of about five minutes. Both crew members expressed concern about the directive to run long, although the memos prepared by the two managers describe that the Grievor was particularly and increasingly agitated and loud. The Grievor was insisting that Assistant Superintendent Smith admit he was violating the Collective Agreement in making the crew run long. In contrast, Locomotive Engineer Smoroden’s approach was measured and calm. After the call, the crew completed the assignment as directed. A short delay was occasioned by these events.

Later that day the Grievor sent an email to Superintendent Dergousoff indicating that the Grievor felt threatened and bullied by Assistant Superintendent Smith during their phone call. That email forms the basis of the alleged harassment complaint and what the Company relies on in (iii) above.

On October 28, 2014 the Grievor “booked unfit” under the following provision of the parties Collective Agreement:

An employee being physical unfit for duty will report same to the crew management centre, so that the employee may not be called. The employee will not be disciplined for “booking unfit”.

No payment is provided to employees when they book unfit.

Assistant Superintendent Smith, who had been involved in the earlier events at Fort Steele over the running long issue, was driving by the Grievor’s daughter’s farm, and saw the Grievor on an excavator. This resulted in the discipline relied on in (ii) above.

The Grievor explains he was upset about the earlier events, said he had not been sleeping well and did not feel able to work that morning (his ten hour shift would have begun early). He slept in, did some work on the excavator and rested the remainder of the day.

The Grievor has 185 career demerit points on his record, but no active demerits at the time of these events. Locomotive Engineer Smoroden was not disciplined for his role in the October 25, 2014 events.

Re (i): Disrespectful and rude behavior towards a manager resulting in a delay:

Both crew members voiced their concerns at being required to run long without prior notification. They engaged in discussion with the Assistant Trainmaster and then on the phone with Assistant Superintendent Smith. Assistant Trainmaster Bailey attempted to clarify the instruction and the ensuing discussion and phone call resulted in a short delay. Neither the locomotive engineer nor the Grievor refused to do the work and they carried out the assignment as instructed.

It appears from the material filed that the Grievor was louder and more argumentative than he needed to be. In addition, the Grievor wanted Assistant Superintendent Smith to admit a violation of the Collective Agreement. He carried on the incident for longer than he should have and escalated it beyond what he should have. In such conduct the Grievor went beyond acceptable communication in the workplace. I find that the manner in which the Grievor dealt with the situation merited some discipline. In this case, a written warning is appropriate.

Re (ii): improper use of booking unfit;

The Grievor said he did not feel as though he could work on October 28, 2014. He had been upset about the earlier altercation and needed sleep. There is no evidence to dispute that other than that Assistant Superintendent Smith briefly saw him on an excavator on the day in question. I am not persuaded, given the Grievor's undisputed evidence provided at the investigation and the purpose of the booking unfit provision, that his time on the excavator undermines the Grievor's credibility.

Re (iii): submitting a false and or/ fabricated harassment claim;

The Company conducted an investigation of the Grievor's complaint as found in his October 25, 2014 email and found it to be without merit. The Union submits that neither it nor the Grievor was provided with the documentation and/or phone recordings of the conversation between the Grievor and Assistant Superintendent Smith to support that conclusion and as such the process is flawed and the discipline should be rendered null and void.

Having read and considered the complaint, it is primarily a rendition of why the Grievor thought he was correct in not being required to run long and how he perceived the tone of the conversation with Assistant Superintendent Smith. The Grievor's written version of events contained in his email did not justify discipline.

Given the nature of what occurred in these three incidents, the Grievor's thirty-three years with the Company, his disciplinary history (zero demerits at the time of the incidents) and the severity of the discipline issued to the Grievor, I find that discharge was not justified.

Even if the Grievor's approach on October 25, 2014 was not as measured or appropriate as that of Locomotive Engineer Smoroden, it did not, combined with what else the Company relies upon, warrant outright discharge.

Accordingly, the grievance is allowed in part. The grievor is to be reinstated to his employment forthwith with compensation for all wages and benefits lost and without loss of seniority. A written warning is to be placed on his record for the events of October 25, 2014.

February 3, 2016

MARILYN SILVERMAN
ARBITRATOR