

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4494

Heard in Edmonton, September 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of F. Chamberlain.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following investigations, on November 13, 2015, Conductor Fred Chamberlain received two CP Form 104's dismissing him from Company service;

"Please be advised that you have been dismissed from Company Service as you have breached the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline record and the culminating incident of failing to release the handbrakes from rail cars SOO 600327, UNPX 127251 and CP 421877 after lifting them from Sudbury and failing to conduct a required pull-by inspection resulting in a delay to train 420-20 on September 22, 2015. The above referenced incident is a violation of: CROR General Notice; CROR 111(a); CROR 106; CROR 113",

And

"Please be advised that you have been DISMISSED from Company Service as you have breached the bond of trust necessary from continued employment with the Company as evidenced by your prior discipline record and the culminating incident of your conduct unbecoming of an employee when you urinated next to the north side of the Mactier Station building at approximately 1415 on October 13th, 2015."

The Company did not respond to the Union's Step 1 or Step 2 grievances as per the prescribed time lines.

The Union contends that Conductor Chamberlain's dismissal was unjustified, unwarranted and excessive in all of the circumstances in these matters. The Union further believes Mr. Chamberlain did not receive a fair and impartial investigation. In regards to Mr. Chamberlain's second Form 104 again dismissing him (for urinating) is in violation of Mr. Chamberlain's Human Rights as he has been discriminated against.

The Union request that Conductor Chamberlain 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 request the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) W. Apsey
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Medd – Labour Relations Manager, Calgary

There appeared on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
 W. Apsey – General Chairman, Smiths Falls
 F. Chamberlain – Grievor, Midland

AWARD OF THE ARBITRATOR

Mr. Fred Chamberlain is a fifty-one year old man three and one half years from retirement. This award concerns two dismissal letters. The latter arose from an incident that occurred during a formal investigation into the former. I propose to deal with the second incident first.

The October 13, 2015 Incident

Mr. Chamberlain was required to attend a second investigation into the subject matter of the other grievance. The investigation was being conducted by Terry Lee, the Trainmaster of the MacTier Subdivision. Mr. Chamberlain had Jason Diggles, his local TCRC Chairman, with him. The investigation took place in the MacTier Railway Station, a small station building with only one washroom. During that supplemental investigation the Union Representative raised a number of procedural objections. The transcript suggests the Union Representative and the Investigating Officer were getting somewhat

testy with each other; unduly so in my assessment. At one point the following exchange took place:

At this point the Accredited Representative tells the Investigating Officer he is going to take a bathroom break with Mr. Chamberlain. The Investigating Officer reminds the Union Representative that he is to request a break. The Investigating Officer will or may not grant a break as situations dictate.

The Union objects that the Investigating Officer is putting pressure on the employee and the Union Officer. This is intimidation towards the employee and local chairman and as such is unfair. The local chairman simply stated that he was going to take a bio-brake and have a few words with Mr. Fred Chamberlain.

At this point Mr. Diggles stands up and leave the investigation and calls Mr. Chamberlain with him. No. request for a recess was made nor was one granted. This brings into question the Union Representatives respect for standard protocols with respect to the conducting of employee statements.

Mr. Chamberlain needed to go to the washroom. The one washroom was occupied by someone else, for an unduly long period of time; not an uncommon human experience. Mr. Chamberlain explained what happened next:

I couldn't wait any longer and I had to go and I was worried about getting back in for the statement. (A.08)

...

I believe I waited a fair amount of time for the washroom to clear (approximately 10-15 minutes) there is only one washroom in the MacTier Station. I went outside and took a vantage point where I believed no one could see me as I believe 113 was pulling by. I proceeded to do my business on the ground. There was nobody around and I was not trying to broadcast what I was doing to anyone. Not realizing I could have went to the bunkhouse because I had to come back into station as I was in for a formal statement. I did not want to delay the statement. That was my concern. (A.07)

I was holding it for about 15 minutes and it got to the point where I just could not hold it there. (A.09)

Despite his effort to be discreet, Mr. Chamberlain was observed by Trainmaster Dave Purdon who saw him from his vehicle. Rather than look away, Mr. Purdon confronted Mr. Chamberlain.

I walked towards Mr. Chamberlain as he completed his task, he walked towards the door and I called out to him to come and speak with me. I asked him what he was doing, he replied I was going to the washroom, he said the bathroom at the station was being used. I asked him why he did not use the bunkhouse which was located 100 feet from the station. Mr. Chamberlain indicated he did not think about this. I asked him what a residence or other person would think of CP rail employees when they observed you urinating outside of the station facing the roadway in Mactier. He did not comment, I indicated to him that if he was observed it would tarnish the reputation of all employees at CP Rail.

During the later investigation, also conducted by Mr. Lee, Mr. Chamberlain provided a note from his doctor describing his medical condition as follows:

Mr. Chamberlain was assessed today. He suffers from symptoms of benign prostate hypertrophy. His symptoms include frequent urination and urgency.

Mr. Chamberlain's attitude during the investigation was entirely contrite. He explained:

When I had my conversation with Mr. Purdon I did tell him of the urgency and I apologized. He said he does not want apology. I don't make a habit of urinating anywhere, usually I am in the vicinity of a washroom close by.

I apologize whole heartedly. I waited as long as I could for the only bathroom in MacTier to be vacant before going outside. I found what I thought was a private place outside to do my business. I was obviously seen by a Company Official. I had to go with such urgency I never thought about going to the bunkhouse, but I will the next time when the urgency arises. I understand how negatively this can be viewed from the Company's point of view, but this was simply a case where I could not hold it anymore. Again this is out of character for me as I usually have time to find a facility.

I accept Mr. Chamberlain's description of the dilemma he faced. Obviously with hindsight a trip to the bunkhouse would have been preferable. I accept that he tried to be discreet. There is no evidence to suggest he was in any way intending to be disrespectful to CP and no harm did, or was even likely to, result from his choice. There is no evidence this was a high traffic area. Even without the medical evidence, this incident was only worthy of a warning. With the medical evidence and Mr. Chamberlain's contrition, there was virtually no just cause for discipline. Regrettably, my conclusion is that this was more an irritated response to the objections being taken by the grievor's representative during the investigation. There was no justification for the conclusion that the grievor "had breached the burden of trust necessary for continued employment". The grievance is allowed, the discipline set aside and the grievance record in respect to this incident is to be expunged.

The September 22, 2015 brake release incident

The grievor was the Conductor on train 420.20 when it arrived in Sudbury, Ontario. He had duties to perform on the train while in the yard, but another crew took charge of the train as it continued on its journey. About 36 miles out of Sudbury at Burwash, and after passing two hot box detectors without any indication of a problem, a track foreman observed smoke coming off a wheel on car S00600327. The train was stopped and an investigation followed. One wheel and brake shoe had to be pried apart.

That investigation revealed that the hand brakes were applied on three cars: S00600327, UNPX127251 and CP421877.

Two possibilities exist: that the brakes were not properly released in Sudbury or they applied themselves in between Sudbury and the point at which the smoke was observed. The Union suggests that the latter is possible and would explain why the two hot box sensors showed nothing. The Company has warned about “hand brake creep” through a bulletin reading:

We have had several instances of hand brake creep with regards to Intermodal cars and trains, it has been found that hand brakes are not being fully released in many of these cases. It is imperative that when lifting Intermodal cars at any location all hand brakes must be FULLY released.

Hand brake creep happens when hand brake is not fully released and the motion of the car at higher speeds causes the hand brake to slowly creep back causing friction to the wheel and alarms at the scanner for hot wheels.

Crew members/Mechanical staff must ensure hand brakes are fully released at all times.

The inspection at Burwash found three hand brakes applied, not just one. On the balance of probabilities the likelihood of three instances of hand brake creep occurring over 36 miles, for three contiguous cars, all coming from the same track, is too unlikely to displace the more probable conclusion that the problem originated in Sudbury.

There is no suggestion that the outgoing crew had responsibility for this situation. The responsibilities lay with the inbound crew, being the grievor as Conductor and Mr. Bruce Austin as Locomotive Engineer.

When 420-20 arrived in Sudbury, the crew had to drop off some cars and then pick up others, which is a routine operation. The cars to be picked up were in tracks 8, 15 and 9. Company records show that the three cars discovered at Burwash with the brakes applied were those located at the west end of track 9.

The details of the switching in the Sudbury yard do not really matter. As part of assembling the train, it is admitted that the crew picked up the three cars from the west end of track 9. Mr. Chamberlain says he fully released the brakes on these three cars. The Arbitrator concludes, as did the Employer, that he could not have done so adequately, since all three were locked by the time the train reached Burwash.

The Company maintains that the grievor was required to perform a pull-by inspection of the train, once assembled, following the change of crew. The grievor did not perform such an inspection and was not given any permission not to do so. As such a pull-by inspection, it is said, may have revealed the still applied brakes and prevented the problems and attendant delay of train 420-20. Such inspections are an important precaution to protect against overheated wheels and consequent derailments.

In the first investigation meeting on October 13, Mr. Chamberlain was not asked anything about a pull-by inspection in the Sudbury yard. However, a couple of hours earlier Mr. Austin had been asked:

Q35 Mr. Austin once your train was back together and there crew was on did you perform a pull by inspection upon their departure?

A No.

Q36 Mr. Austin why did you not perform a pull by inspection?

A We had given notice and we were to get in the cab and get going.

Q37 Mr. Austin in summary and your answers to Q21, Q23, Q27 and Q31 Mr. Chamberlain had the cars in question either pulled past him or walk by on 4 separate occasions, is this correct?

A No, it was pulled by twice and walked once.

Q38 CROR 106. Crew Responsibilities

All crew members are responsible for the safe operation of movements and equipment in their charge and for the observance of the rules. Under conditions not provided for by the rules, they must take every precaution for protection. A utility employee becomes a crew member when working with any movement.

Despite there being a live issue at the time of the first interview, Mr. Chamberlain was only asked about it during the second. At that time, he was asked:

Q27 Did you and locomotive engineer Austin perform a passing train inspection as 420-20 departed Sudbury?

A27 No. At that point we were in the cab. I did do a 1A inspection on the cars that were lifted and the cars that were set over. We did a roll by inspection on this portion of the train.

Despite the reference to CROR 106 and crew responsibilities, Mr. Austin received no discipline for the incident whereas Mr. Chamberlain was terminated.

I am satisfied, on the evidence, that the releasing of the hand brakes of the three cars on the westend of track 15 in the Sudbury yard was inadequate, and that Mr. Chamberlain was the one primarily responsible for ensuring it was done. I am not

satisfied Mr. Chamberlain was appropriately disciplined for not ensuring a pull-by inspection of the full train was undertaken. Even if that had been sustained in fact, and as a requirement in these circumstances, I would find the totally disproportionate treatment of Mr. Austin in the circumstances would provide a strong mitigating argument for Mr. Chamberlain.

Progressive Discipline and the Grievor's Record

The Company's position is that the grievor's record was such that, using the principles of progressive discipline, termination was warranted. That might have been so had I sustained both grievances and the full impact of the more serious allegations. Just cause has however been established, and while serious, it is of a lesser degree than that considered by the Company in deciding upon termination.

The grievor's record before these events is not good. Prior to this event it included: two-hundred-thirty career demerits, a dismissal replaced by a reinstatement in 1989/1990, a dismissal in 2003 due to the accumulation of points, followed by a deferral of thirty points from the final discipline allowing reinstatement, and a June 2015, thirty day suspension for not reducing a train's speed below 10 MPH after a yellow flag.

The grievor is a long service employee. He has only three and half years to go before pension eligibility. His length of service is a very important mitigating factor. However, failing to properly release the brake on these three cars is also a serious matter.

In all the circumstances, I am persuaded this is a case where the termination should be set aside and a lesser penalty imposed. Mr. Chamberlain's record will be adjusted to show a four month suspension, and he will be compensated for any lost wages and benefits for time lost beyond that period. Two conditions are also imposed:

Prior to returning to active duty, Mr. Chamberlain must first submit to a safety critical fitness to work medical assessment, including all medical assessments deemed necessary under the terms and conditions directed by the Occupational Health Services Department (OHS). In this regard, Mr. Chamberlain must be determined to be medically fit to return to service in the safety critical position of Conductor by the Chief Medical Officer or his delegate.

Before recommencing active duty, Mr. Chamberlain will be required to successfully complete any necessary training or re-qualification including Rules Qualification followed by formal testing as directed by an Instructor Training Manager.

Mr. Chamberlain must understand that, as his record will stand following this decision, his continuing employment will be in serious jeopardy should any further cause for discipline arise.

October 14, 2016



ANDREW C. L. SIMS
ARBITRATOR