CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4638

Heard in Calgary, May 9, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the three assessments discipline and one assessment of discharge to Conductor Brady Gutwin of Moose Jaw, SK

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant matter involves 4 separate assessments of discipline.

A - 30 Day Suspension

Following an investigation Mr. Gutwin was issued a 30 day suspension described as "30 Day Suspension (1710 March 15, 2016 to 1709 April 14, 2016) which includes time held out of service. Failure to complete work assignment by not working in a productive manner at Kalium, near mile 118.3 on the Indian Head Subdivision while working on train K39 on March 14, 2016. A violation of Rule Book for T&E Employees, 2.2 While on Duty and Summary Bulletin - General Information (N) Crew Expectations." The Company did not respond to all of the Union's grievances.

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 Mr. Gutwin be made whole.

The Union submits that Mr. Gutwin was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union submits the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. In the alternative, the Union contends that Mr. Gutwin's 30 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline. The Union requests that the discipline be removed in its entirety, and that Mr. Gutwin is made whole for all associated loss plus 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.

B - 14 Day Suspension

Following an investigation Mr. Gutwin was issued a 14 day suspension (deferred) described as “For failure to fulfill your contractual obligation as evidenced by your booking unfit on September 19 and October 12 and booking sick on September 25, October 29 & 30 which were both on weekends. A violation of Canadian Pacific Attendance Management Policy, while employed as a Conductor in Moose Jaw, Saskatchewan.”

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 Mr. Gutwin be made whole.

The Union contends the Company has improperly applied the process of deferral in the instant matter, which therefore fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09. It is also the Union’s contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. Additionally, it is the Union’s position that the Company has failed in providing the absences in question were not bona fide.

The Union submits that Mr. Gutwin 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 contends the discipline assessed to Mr. Gutwin is unjustified, unwarranted and excessive in all of the circumstances, including 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. Gutwin’s employment record, and he be made whole for all associated loss 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.

C - 30 Day Deferred Suspension

Following an investigation Mr. Gutwin was issued a 30 day suspension (deferred) described as “For failure to fulfill your contractual obligation as evidenced by your being unavailable for duty after familiarization from November 4 to 8, 2016 inclusive. A violation of Canadian Pacific Attendance Management Policy, while employed as a Conductor in Moose Jaw, Saskatchewan.” The Company did not respond to the Union’s grievances.

The Union contends the Company has improperly applied the process of deferral in the instant matter, which fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding all of the allegations outlined above. The Union further contends that Mr. Gutwin’s 30 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union’s contention that the penalty assessed is contrary to the arbitral principles of progressive discipline, and violates company policy.

The Union requests that the discipline be removed in its entirety, and that Mr. Gutwin is made whole for all associated loss 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.

D - Dismissal

Following an investigation Mr. Gutwin was dismissed which was described as “For breaching the bond of trust necessary for continued employment with Canadian Pacific, by your

failure to fulfill your contractual obligation as evidenced by your intentionally not showing up for duty on your Assigned Job on October 7, 2016. A violation of the Canadian Pacific Attendance Management Policy, while employed as a Conductor in Moose Jaw, Saskatchewan."

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 Mr. Gutwin be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding all of the allegations outlined above. The Union further contends that the penalty of dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline, and is contrary to Company policy.

The Union requests that Mr. Gutwin be reinstated without loss of seniority and benefits, and that be made whole for all associated loss including 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.) D. Fulton
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

S. Oliver	– Manager, Labour Relations, Calgary
C. Clark	– Assistant Director, Labour Relations, Calgary

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
W. Zimmer	– Local Chairperson, Moose Jaw
W. Apsey	– General Chairperson, Smiths Falls

AWARD OF THE ARBITRATOR

The facts and issues relative to Mr. Gutwin's four separate grievances are set out above. I will deal with each in order and attempt to avoid repetition.

Brady Gutwin, the grievor, was hired as a Conductor in Moose Jaw, Saskatchewan on February 23rd, 2015. He is twenty-four years old and resides in Regina.

A – 30 Day Suspension

Mr. Gutwin was assessed a 30 day suspension for failing to work in a productive manner on March 14, 2016. On that day the Grievor, as a Conductor, along with a crew of Locomotive Engineer Arens and Brakeman Beaucauge, was assigned to the Mosaic Kalium road switcher assignment. The evidence revealed that, on that shift, the following delays occurred:

22:00 – 23:16;
00:35 – 02:01:07;
04:50:23 – 06:00.

Although the shift assignment began at 22:00, the first engine movement did not take place until 23:16 - one hour and sixteen minutes after the assignment began. The Grievor's explanation for the delay appears as Q.23 of his interview wherein he advises that the downtime was due to the fact that they had to:

> "Wait for paper work to come in over the fax, then job briefing, review the track schematics, phone mosaic and log in / review the AIR tablet".

Mr. Arens' response (Q.23) was almost identical. While Mr. Beaucage (Q.23) expanded his response to point out that the Grievor's failure to log in to the AIR Tablet added to the delay.

Trainmaster Justin Drover reported (Company Exhibit; Tab 4c) that he spoke with the Grievor ten minutes after the shift began and was informed that the paperwork was not available. He instructed the Grievor to call Mosaic to clarify their needs and call him back, after he received the paper work, so that they could go through it together.

Having not received the call back, Mr. Drover called again at 22:35 and was informed, by the Grievor, that he had just received the paperwork. However, records indicate that the paperwork was **faxed** to him at 22:13. While on the phone, Mr. Drover and the Grievor went through the various tasks to be completed during the shift. The conversation concluded with Mr. Drover asking the Grievor if he knew exactly what was required of him to ensure that the work that day could be carried out. The Grievor had no questions. That call began at approximately 22:35 and concluded shortly thereafter. There was no reasonable explanation from the Grievor for the further delay between the conclusion of the call with Mr. Drover and the actual time that the switching movement began at 23:16.

While the Grievor provided a more detailed answer for the delay between 00:35:45 – 02:01:07 (Q. 25), distilled to their essence his explanations for the delay in all three cases is reflected in *Q. 38* of his Statement (and repeated in *Q's 23 & 36):*

> Q. 38: "So, for this particular K39 shift there was approximately 4 hours and 18 minutes of available production time allotted to serving our … customers…"
>
> A. Yes, according to the documents, however a lot of that time was going over the paperwork, job briefings and the AIR tablet"

Assistant Superintendent Jeff Closs reported (Company Exhibit; Tab 4b) that he attended at the Kalium trailer at approximately 05:25. He noted the Kalium switcher parked on the east side of the crossing. He entered the trailer and *"… observed both Mr. Arens and Mr. Beaucage in the kitchen area …* (and) *… Mr. Brady Gutwin in the computer area using the AIR Tablet"*. A discussion ensued regarding their twenty minute lunch break (as it related to the time they were in the trailer when Mr. Closs arrived). However,

it is apparent that, at this point, according to the Grievor, *(Q. 25)*, the crew had already taken a lunch break during the second downtime period between 00:35:45 – 02:01:07.

Mr. Closs enquired of the crew whether all of the customers' service had been completed. The Grievor advised that they had not, but that all of the cars had been placed in Track 11 and were ready to go for the next crew. When Mr. Closs asked why, with an hour left in their shift, they did not service the Yara and Terra work, the crew advised that the Grievor had to report his work on the AIR Tablet and to do that work would require overtime.

Mr. Closs then left the trailer and downloaded the relevant information from locomotive 3105 which revealed the following information:

> 23:16:22 – First sign of movement after shift start
> 00:35:45 – 02:01:07 – No movement (Lunch Break)
> 04:50:23 – Last movement before end of shift

Mr. Closs returned to the trailer; informed the crew that the download revealed approximately 3.45 hours of downtime out of their 8 hour shift; and, asked for an explanation. The explanation was that:

> "…at the beginning of the shift they had to wait for paperwork account there's a delay because Winnipeg has to update the inventory. I asked them if they could have called Mosaics loads out and performed some of their switching while waiting for Winnipeg. They stated they could have.
> I then asked them with the amount of down time incurred could they have completed servicing Yara and Terra. They indicated they could have."

Considering the grievances involved and the arguments made, this case presented evidentiary and credibility issues that clearly would have been better addressed in a full hearing replete with *viva voce* evidence. While not the only rationale, the above observation is immediately apparent from a review of *Q.5 – Q.8* of the Greivors statement (Union Exhibit; Tab 5) wherein the Grievor disagrees with certain aspects of the evidence of Mr. Drover and Mr. Closs. Nevertheless, in light of the parties' determination to use this process instead, I am left to decide these issues based on the documentation and arguments alone. Having considered the totality of the evidence before me, I accept the evidence of Mr. Closs and Mr. Drover.

There is no merit to the Union's contention that the investigation, in this instance, was not conducted in a fair and impartial manner.

The primary responsibility for leading the completion of the work required, in the circumstances here, fell to the Grievor in his capacity as the Conductor. The evidence of Mr. Arens (Union Exhibit; Tab. 3 Q. 25) makes it apparent that during the 1 hour and 22 minutes of down time that followed after 00:35:45 the Grievor was still: *"…unsure of what cars load out wanted at the west to be spotted*…" and what those cars had contained. It appears that Mr. Arens had to tell the Grievor that he needed to: *"… go into the office and call load out to find out exactly what cars they required…*". In his explanation for the delay, the Grievor makes no mention of having to be instructed on how to address this issue. In addition, there was no reasonable explanation provided by the Grievor: for the time between 22:35 (after the Grievor and Mr. Drover went through all the assignments

for the day) and 23:16 (when the engine first moved); the excessive downtime when Mr. Closs raised it with the crew; nor the failure to service the Yara and Terra yards when they indicated that they could have done it (as referred to above).

The onus in disciplinary matters falls to the Company to prove its case on a balance of probabilities (*F.H. v. McDougall, [2008] 3 S.C.R. 41, 2008 SCC 53*). This involves demonstrating, on that balance, that its evidence is to be preferred, **(CROA 4603**). Here, on the balance, the Company satisfied me that, in the circumstances, downtime for a period of 3 hours and 45 minutes - out of an 8:00 hour day – occurred; and, that such downtime, without an otherwise reasonable explanation for the same, is disproportionate.

Where a *prima facie* case has been established by the party bearing the onus of proof, courts/arbitrators have taken the view that the "evidentiary burden of proof" shifts to the opposing party *(Brown and Beatty; para: 3:24:11)* and it is insufficient for the Grievor to rely on the Company's ultimate burden as his defense.

Given the independent nature of their work, the specific facts of what occurred at the Kalium yard were peculiarly within the knowledge of the Grievor and his crew. While the ultimate onus is on the Company - and suspicion alone is insufficient to ground an assessment of discipline - that peculiar knowledge requires the Grievor to provide a credible explanation for the downtime in order to meet the *prima facie* case established by the Company that a disproportionate and unreasonable amount of downtime occurred.

An explanation that is irrational and lacks credibility, does not amount to a reasonable explanation. In my view, the repetitive explanation that the downtime of 3:45 out of an 8 hour day was taken up by "…*a lot of … time … going over the paperwork, job briefings and the AIR tablet"* is neither credible nor reasonable in the circumstances. This is especially so since the paperwork, job briefings and the AIR Tablet are part of the regular duties of all crews that perform that work.

Accordingly, the Company has demonstrated that there are sufficient grounds for discipline in this case. However, given the Grievor's short service and inexperience with the yard in question, I conclude that a 30 day suspension is excessive in the circumstances. The grievance is allowed in part and the suspension reduced to 20 days.

Suspensions and Dismissal

All of the remaining grievances deal with the suspension/dismissal arising from the Grievor's failure to attend at work over a period of time spanning September to November 2016.

The Company served three separate Notices to Appear on the Grievor on December 13, 2016. (1) The first related to the Grievor's work history from September 8 to October 31, 2016; (2) the second to his work history from October 31 to November 10, 2016; and, (3) the third related to a single incident occurring on October 7, 2016.

The Company then held three separate investigations, in succession, on December 22, 2016. On January 10, 2017 it issued three separate disciplines as follows:

1. A 14 day suspension (Deferred) with respect to (1) above;
2. A 30 day suspension (Deferred) with respect to (2) above; and
3. Dismissal with respect to the incident which occurred on October 7, 2016.

The Union argued, with respect to each of the disciplines, that the investigations involved were not conducted in a fair and impartial or timely manner.

With respect to the timeliness aspect, in **CROA 3804**, Arbitrator Picher stated:

> "The Union raised challenges to the fairness of the disciplinary investigation which were conducted by the Company into the grievor's problem of absenteeism. Among other things, it submits that two great a time period elapsed before the investigations were conducted. The Arbitrator cannot agree. I am satisfied that in each case it was appropriate for the Company to examine a relatively extensive period of time during which absences occurred, there being no other realistic basis upon which it could deal with what was essentially an unacceptable pattern of absenteeism..."

In order to assess an employee's record with respect to absences, an extended period of time needs to be viewed in order to arrive at a determination whether there is a pattern of absenteeism. Leaving aside the dismissal discipline (which is dealt with later), I can find no basis for concluding that the investigations relating to the suspensions, although they extended over the period of time as indicated, were unfair, impartial or untimely.

The Union's argued, relative to the allegation of unfairness and impartial investigation, that Trainmaster Crozier involvement in the investigations tainted the

outcome. I am not convinced that the conduct of Mr. Crozier was such as to put it in the category as unfair and impartial. The Union's objection in that respect fails.

Finally, the Union argues that the imposition of deferred disciplines, in the 14 and 30 day suspensions, do not comply with the requirements of Article 72.09 of the Collective Agreement. I agree. As already pointed out by Arbitrator Sims in **CROA 4620** and Arbitrator Clarke in **CROA 4630**, the use of deferred discipline must fall within the parameters of Article 70.09. In both the 14 and 30 day suspensions, they do not. However, while the deferred disciplines imposed did not comply with the provisions of Article 70.09, the breach of the same (as reflected by both decisions above) calls for an intervention and alteration of the penalty rather than voiding the discipline in its entirety.

B - 14 - Day Deferred Suspension

At the time that the first of the events described in the Statements of Issue took place, the Grievor's disciplinary record consisted of a 5 day suspension for improperly booking off on weekends on seven different occasions – demonstrating a pattern.

With respect to the 14 day suspension, I conclude that the Company provided sufficient evidence to show that the conduct of the Grievor, in booking off work on weekends (except for one day), warranted discipline. It is apparent that the Grievor did not learn from his earlier suspension in 2015 and that a further lengthier suspension was warranted. Taking into consideration: the principles of progressive discipline; the pre-existing discipline of 5 days which occurred less than two years earlier; and, considering

that the current conduct involved similar conduct to the earlier 5 day suspension, I conclude that the grievance should be allowed in part and the Grievor be assessed discipline of a 10 day suspension.

C - 30 - Day Deferred Suspension

Here the circumstances differ markedly from the earlier grievance related to the booking off from work. In this instance, the Grievor failed to show up for work and was disciplined for being unavailable for duty, from November 4 to 8 inclusive.

Inexplicably, the Grievor failed to report for work on the given dates. Additionally, it is apparent that he avoided all contact with the Company to the point where Trainmaster Crozier became concerned about his safety and asked the Moose Jaw Police Services to do a well-ness check on him. The Grievor, in the investigation allowed that:

> "...there could have been a better way to deal with it. For that I apologize for the inconvenience caused."

He said this in reference to his explanation that his absence was due to his grieving the untimely passing of his friend. However, as the Company points out, the Grievor had already been accommodated with time off to deal with the passing of his friend after his friend died on October 1, 2016.

While I can understand and sympathize with the Grievor's emotional burden in dealing with the death of his young friend, the reality is that his failure to properly notify the Company of his impending absence (which in itself is cause for discipline) was

exacerbated by his further misconduct in the purposive avoidance of contact with the Company in the intervening period.

In the circumstances, having regard to the Grievor's failure to notify the Company; his purposive avoidance of contact with the Company; the fact that - having regard to my determination relative to the 14 day deferred suspension - the Grievor now had two previous disciplines with respect to absence issues, I am of the view that a substantial suspension is warranted. In keeping with the principles of progressive discipline, I conclude that the Grievance should be allowed in part and that the discipline of a 30 day suspension be reduced to a 20 day suspension.

D – Dismissal

While I concluded that the investigations and discipline assessed for the suspensions were neither untimely nor unfair, the same does not hold true for the dismissal. The Notice to Appear, investigation and determination relative to the dismissal related to a single event which took place on October 7, 2016. The date of the Grievor's misconduct occurred in the midst of the dates involved with respect to the 14 day deferred suspension. Its appearance, as a separate incident over two months later, leaves me with no question that it is a case of piling on.

Even were that not so, considering that the Company regarded it as sufficiently serious misconduct to warrant dismissal (a determination which is not supported by the

circumstances), withholding the complaint until December breached the Grievor's right to a timely investigation. As noted by Arbitrator Picher in **CROA 3011**:

> "…it is inconsistent with the precepts of a fair and impartial investigation for an employer to withhold from an employee a complaint of serious allegations of misconduct for a substantial period of months …"

The dismissal Grievance is allowed.

The Grievor shall accordingly be reinstated without loss of seniority, and made whole after allowance for the suspensions contained in this award.

Finally, I would be remiss if I did not address the Grievor's abysmal attendance record – particularly in light of his short term of service. His repeated absences and ensuing discipline reflects his apparent failure and refusal to learn from his past performance. In that respect, I am guided by the reasonable terms of reinstatement provided by Arbitrator Picher in **CROA 3804.**

The Grievor's reinstatement shall be subject to the following provision:

> For the first two years following his reinstatement the Grievor shall be required to register a rate of attendance at work which is no less than the average of his peers. Should he fail, during any quarter during that two year period, calculated on a rolling basis, to register a rate of attendance equal to or better than his peers, he shall be subject to immediate dismissal, with recourse to

arbitration only for the purposes of determining the Grievor's attendance and the average attendance of the other employees.

Summary

For ease of reference, the four grievances have been resolved as follows:

1. April 4, 2016 – 30 day suspension for not working in a productive manner reduced to a 20 day suspension;

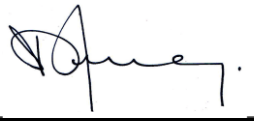
2. January 10, 2017 - 14 day deferred suspension reduced to a 10 day suspension;

3. January 10, 2017 - 30 day deferred suspension reduced to a 20 day suspension;

4. January 10, 2017 - dismissal overturned in its entirety;

5. The Grievor shall meet the future attendance requirements set out above.

June 27, 2018



RICHARD I. HORNUNG, Q.C.
ARBITRATOR