

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

CASE NO. 4701

Heard in Montreal, October 8, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's five (5) assessments of discipline to Locomotive Engineer B. Beatty, resulting in discharge due to an accumulation of demerits.

JOINT STATEMENT OF ISSUE:

- A.** 20 demerits for booking unfit on call on June 18, 2018 while assigned as an Engineer on the Hornepayne spare board.
- B.** 15 demerits for failure to book on after being cleared to return to work, resulting in your unauthorized absence between September 6 and September 11, 2018.
- C.** 15 demerits for failing to follow Company instructions, when you did not provide a note as required by BCM 406915 dated November 11, 2018.
- D.** 10 demerits for missing a call on January 29th 2019 at 0532 for assignment RX10651 23 as Locomotive Engineer
- E.** 20 demerits for refusal to comply with Company instructions as required in BCM #431865, and letter dated July 12, 2019

As a result of the five (5) investigations, Mr. Beatty's record was assessed with 80 demerits, bringing his overall record to 125 active demerits.

UNION'S POSITION:

A. 20 Demerits

The Union contends that the investigation was not conducted in a fair and impartial manner as per the requirements of the present collective agreement.

The Union contends that on a balance of probabilities, the Company has failed to meet the burden of proof in this instance.

The Union submits Mr. Beatty is a safety critical employee who are required under the CROR and other legislation to be the judge of their own condition.

In the alternative, the Union submits there are mitigating factors which warrant the removal of discipline, such as but not limited to, Mr. Beatty was apologetic any inconveniences this may have caused.

The Union contends that the discipline assessed is unwarranted, and in any event, excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety and he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

B. 15 Demerits

The facts are not in dispute.

The Union submits that there are mitigating factors in this instance. Mr. Beatty has a medical condition that is documented with OHS. The Union submits that Mr. Beatty's condition is protected under the *Canadian Human Rights Act*, and as such, the Company is obligated to accommodate him up to the point of undue hardship.

In the alternative, the Union submits there are other mitigating factors which warrant the removal of discipline, such as but not limited to, Mr. Beatty was forthright and apologetic for his actions.

The Union contends that the discipline assessed is unwarranted, and in any event, excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety and he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

C. 15 Demerits

Mr. Beatty was booked off sick from October 24th 2018 until November 10th 2018. On November 11, 2018, Mr. Beatty provided the Company medical documentation substantiating his absence.

The Union contends that on a balance of probabilities, the Company did not meet the burden of proof in this instance.

The Union contends that the discipline assessed is a violation of Article 94.1 of the 1.1 Agreement, *Canada Labour Code*, and *Canadian Human Rights Act*.

The Union contends that the discipline assessed is unwarranted, and in any event, excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety and he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

D. 10 Demerits

Mr. Beatty had a Personal Leave Day booked to commence at 00:30 on January 30th 2019.

Mr. Beatty was called for an extended run train. At the time of call, the Company had an obligation to determine, as per the collective agreement, if Mr. Beatty would reasonably be back to the home terminal prior to the time his personal leave day was to commence.

In this instance, it was determined that Mr. Beatty would not be back to the home terminal prior to the commencement of his Personal Leave Day, and as such, he chose to go on pre-leave.

The Union contends that once Mr. Beatty was on pre-leave, he was no longer entitled to take any work from the spare board, and as such, should not have been placed back on the spare board at 04:57 on January 29th for the rescue

In the alternative, the Union submits there are mitigating factors in this instance. Mr. Beatty had an emergency situation in his home to deal with which took significant amount of time through the night. Due to his fatigue, his phone was left in the basement where the emergency was located, and did not hear the phone when CMC called.

The Union contends that the discipline assessed is unwarranted, and in any event, excessive in all of the circumstances. The Union requests that the discipline be removed in its

entirety and he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

E. 20 Demerits

On June 29th 2019, Mr. Beatty booked off sick and continued to inform the Company that he was still sick/ill until he booked back on July 25th 2019.

On July 12th 2019, the Company sent Mr. Beatty a CATS Broadcast Message and a letter by mail requesting him to provide Medical information to OHS prior to July 19th 2019.

Mr. Beatty did not provide, to the local trainmaster, the requested medical information until July 27th 2019 due to being distracted due to his medical condition as well as financial issues

The Union contends that on a balance of probabilities, the Company did not meet the burden of proof in this instance. Mr. Beatty did not refuse to provide the medical information.

The Union submits that there are mitigating factors in this instance. Mr. Beatty has a medical condition that is documented with OHS. The Union submits that Mr. Beatty's condition is protected under the Canadian Human Rights Act, and as such, the Company is obligated to accommodate him up to the point of undue hardship.

The Union contends that the discipline assessed is a violation of Article 94.1 of the 1.1 Agreement, Canada Labour Code, and Canadian Human Rights Act.

The Union contends that the discipline assessed is unwarranted, and in any event, excessive in all of the circumstances. The Union requests that the discipline be removed in its entirety and he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION:

A. 20 Demerits

The Company disagrees with the Union's position.

It is the Union's position that the NTA was served in an unrealistic amount of time after the violation. At no time during the investigation did Mr. Beatty demonstrate any difficulty in recalling the events. It is the Company's position that Mr. Beatty was in no way prejudiced by the passage of time.

The Union further submits that the investigation was unfair and impartial. Specifically, the Union asserts that the investigating officer took a recess and received further instructions to add questions. The Union further asserts that the additional questions were intimidating and badgering. The fact that questions were added does not mean the investigation was unfair and impartial, nor were the questions intimidating or badgering.

It is the Company's position that by booking unfit on call, Mr. Beatty did not protect his employment obligations. The fact remains that in spite of being able to book unfit in advance, Mr. Beatty waited until the Company called him.

The 20 demerits assessed were both reasonable and warranted.

B. 15 Demerits

The Company disagrees with the Union's position.

It is not disputed that Mr. Beatty was cleared by OHS to return to work on September 6, 2018, however, he did not book on until the 10th. Mr. Beatty acknowledged that he was supposed to book on and that his absence was unauthorized.

Although the Union submit are there are mitigating factors, they do not say what they are. Contrary to the Union's claim, OHS does not have any medical documentation to support Mr. Beatty could not have booked on when he was cleared.

The 15 demerits assessed was both reasonable and warranted.

C. 15 Demerits

The Company disagrees with the Union's position.

The Company instructed Mr. Beatty to provide specific information to validate his absence from work, however, he failed to comply with the instructions.

The Company denies the allegation that the Canada Labour Code was violated. With respect to the claim that Mr. Beatty suffers from a disability protected under the Canadian Human Rights Act; this, in of itself, does not shelter him from discipline for culpable behaviour. Mr. Beatty has previously been asked if he has a condition that requires accommodation, however, to date he has not indicated he does.

Furthermore, given Mr. Beatty's continued refusal to provide the Company with medical, it is unclear on what basis the Company could come to the conclusion that Mr. Beatty suffers from a disability.

The 15 demerits assessed was both reasonable and warranted.

D. 10 Demerits

It is undisputed that Mr. Beatty missed a call for work on January 29, 2019, while protecting the spare board. While Mr. Beatty did have a PLD scheduled for January 30, 2019, he understood and acknowledged that he was told he would be placed first up for a call for a short turn.

The Company does not accept Mr. Beatty's heating system problems as mitigation. Mr. Beatty could have contacted the crew office or a supervisor to inform them of his issues.

In addition, the fact that the Union does not agree that Mr. Beatty should have been left first up is immaterial, as he clearly accepted that he was.

Finally, Mr. Beatty is a spare board employee; protecting calls on short notice is an employment obligation

10 demerits in the circumstances was both reasonable and warranted

E. 20 Demerits

It is undisputed that Mr. Beatty was instructed by way of letter on July 12, 2019 and in broadcast message BCM 431865 to provide the Company with objective medical to support his absence from work beginning on June 26th and he was to provide the information directly to OHS no later than July 19, 2019.

Despite acknowledging seeing the BCM and receiving the letter and getting a note from his doctor, Mr. Beatty made no effort to contact the Company. He did not contact a supervisor, nor did he contact OHS. Mr. Beatty provided a note on or about July 27th, which was dated July 24th. The note only conveyed Mr. Beatty's self-reported crisis and contrary to the Union's claim, did not contain the information requested by the Company.

The Company has had several conversations with Mr. Beatty regarding his obligation to ensure his absences are authorized by seeking medical attention in a timely manner and providing objective medical in the event that he does not seek disability benefits.

It is not disputed that the instructions sent to Mr. Beatty were to provide OHS with specific medical documentation. When he did not send any medical to OHS, he was not in compliance with the request. There is no partial compliance. Given the Union's contentions with respect to Mr. Beatty suffering from a disability that requires accommodation, the instruction to provide information directly to OHS demonstrates the efforts put forth by the Company despite Mr. Beatty's lack of cooperation.

The Company is well within its rights as an employer to request an employee provided objective medical to validate sick leave. Notwithstanding the above, the Union cannot claim that Mr. Beatty suffers from a disability and in the same breath argue that the only medical that he is obligated to provide is a note from his doctor, which conveys Mr. Beatty's self-reported situational crisis.

With respect to the *Canada Labour Code*, Mr. Beatty was not disciplined for being sick, he was disciplined for failing to follow Company instructions.

With respect to the claim that Mr. Beatty suffers from a disability protected under the *Canadian Human Rights Act*, this, in of itself, does not shelter him from discipline for culpable behaviour. Mr. Beatty has a duty to cooperate and if he feels he requires an accommodation, then it is incumbent upon him to participate. To date, the Company has no information to support Mr. Beatty suffers from a disability that requires accommodation.

Given Mr. Beatty's discipline record already reflects an accumulation of more than 60 demerits, 20 demerits in the circumstances was both reasonable and warranted.

FOR THE UNION:
(SGD.) P. Boucher
General Chairman

FOR THE COMPANY:
(SGD.) V. Paquet
Labour Relations

There appeared on behalf of the Company:

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| V. Paquet | – Manager, Labour Relations, Toronto |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| S. Mumby | – Assistant Superintendent, Capreol |
| M. D. Pitchen | – Director Occupation Health Services, Montreal |
| S. P. Paquette | – Director, Dispute Resolution and Labour Standards, Montreal |
| D. Houle | – Human Resources Partner, Edmonton |
| F. Daignault | – Manager, Labour Relations, Montreal |

And on behalf of the Union:

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| A. Stevens | – Counsel, Caley Wray, Toronto |
| P. Boucher | – General Chairman, Belleville |
| P. Stewart | – Local Chairperson, Hornepayne |
| B. Beatty | – Grievor, Hornepayne |

AWARD OF THE ARBITRATOR

The grievor, a Locomotive Engineer hired in October 2011, was discharged for accumulation of demerit points. At the time of his discharge, the grievor's discipline record stood at 125 demerits. As well, the grievor's record shows two written warnings and two suspensions. The suspensions, it appears, are in the grievance process and are not the subject of this award. Eighty of these demerits are in issue here, being the total of five disciplinary measures imposed between June 2018 and July 2019.

It is noted that under the Brown system of discipline, an employee is subject to discharge upon the accumulation of sixty demerits. In the instant case, the grievor was not discharged upon the accumulation of sixty demerits, and on two occasions he was suspended so those demerits did not accumulate.

I shall deal with the five disciplinary issues that are before me in chronological order.

A. Assessment of 20 demerits

In June 2018, the grievor was assessed 20 demerits for “booking unfit on call on June 18, 2018 while assigned as an Engineer on the Hornepayne spare board.” On that day the grievor did indeed book rest when called. He had ample time for rest following the completion of his previous assignment but planned his time in accordance with what he considered would be his next turn out. He was going to bed when called to protect a call for another train, so it would seem that booking rest was not unjustified or improper. I do not decide this matter on that ground, however.

It was on June 18, 2018 that the grievor booked rest. On September 12 of that year the Company sent the grievor a Notice to Appear for investigation. The Collective Agreement requires that such investigations be held promptly. In **CROA 2615** it was held that a delay of 49 days in holding the investigation went beyond what was reasonable or contemplated by the Collective Agreement. Accordingly, the discipline was found to be a nullity. In **CROA 4692** a delay of 51 days was found to be excessive, although the matter

was determined on other grounds. In the instant case the delay is 85 days, which in my view is clearly excessive. The Company argued that there had been no prejudice to the grievor since he could remember the events - although he stated that his memory was “a bit fuzzy”, but while that might be taken into consideration in a borderline case it does not excuse the extreme violation in the instant case. It is a fatal flaw, and the discipline must be considered a nullity and set aside on this ground.

The elimination of this 20-demerit penalty leaves the grievor with a record of 105 demerits.

B. Assessment of 15 Demerits

On September 26, 2018, the grievor was assessed 15 demerits for “failure to book on after being cleared to return to work, resulting in your unauthorized absence between September 6 and September 11, 2018”. The grievor was absent from work on sick leave from July 21 to September 5, 2018. He was cleared to return to work on September 6 but did not do so until September 10. At the investigation, the grievor acknowledged that it was his obligation to book back on to the working board immediately upon being cleared. His explanation for not doing so was that he had “financial issues”. He obtained a medical report which confirmed that he had been approved for return to work on September 6 and suggests that his delay in returning was due to such financial issues. The report does not indicate that the grievor was in fact unable to work during those days.

Most employees, it is fair to say, like most people in general, have “financial issues” from time to time, and these may at times lead them to seek leave from work to deal with them. The grievor, with a heavy discipline record, some of which involved attendance matters, simply ignored his employment obligation. It has not been shown that he was sick during the period in question, or somehow unable to contact the Company to seek the time off. In these circumstances there was just cause for the imposition of discipline.

In my view, 15 demerits did not go beyond the range of reasonable disciplinary responses to the situation. This grievance is dismissed. It remains that the grievor’s record stands at 105 demerits, subject to the cases which follow.

C. Assessment of 15 Demerits

In November 11, 2018, the grievor was assessed 15 demerits for “failure to follow Company instructions, when you did not provide a note as required by BCM 406915 dated November 11, 2018”. The grievor was absent on sick leave from October 22, 2018. A Doctor’s note at that time said that the grievor required “time off work until well”, and the grievor was in receipt of disability benefits during his absence. These benefits expired when the insurer advised that his expected return to work was November 4, 2018. Nothing in the material before me suggests that the grievor was not able to return on that date. The grievor returned to work on November 10th.

On November 16, the Company sent a message to the grievor requesting that he provide specific medical documentation supporting his absence from November 5 to

November 10. This was clearly a reasonable request. The grievor did not comply with it. He did eventually submit a Doctor's note dated October 24, but that note was obviously not one which could deal with the period from November 5 to November 10. It was argued for the grievor that he felt this note did comply with the requirement, but it is clear on the face of the note that it did not. I find that the grievor did not follow legitimate Company instructions and that there was just cause for the imposition of discipline in this case.

It was argued that 15 demerits was an excessive penalty, and that progressive discipline had not been followed. A glance at the grievor's record shows that the grievor had been disciplined many times – the preceding discipline was 20 demerits, just three months previously. And, as has been noted, the grievor had not been discharged when he first passed the sixty-demerit limit. Had the grievor been a new employee with no discipline record, then I would have considered 15 demerits excessive, and would have reduced the penalty as was done in **CROA 4293** for a similar offence. In the circumstances of the instant case I do not consider that the penalty imposed went beyond the range of reasonable disciplinary responses to the situation, even if it might be considered at the top end of that range.

For all of the forgoing reasons this grievance is dismissed. The grievor's record remains at 105 demerits.

D. Assessment of 10 Demerits

The grievor was assessed 10 demerits for “your Missed Call on January 29, 2019 at 0532 for assignment RX10651 23 as Locomotive Engineer”. The grievor had a Personal Leave Day scheduled for January 30, 2019. When called for a long haul which would not return him in time for the personal leave, he refused the call, and the refusal was accepted. The Union argues that because of the Personal Leave Day the grievor should have been held off the call list. There is no support for this argument. The grievor acknowledged that he was subject to call for a short run, which would not have interfered with his leave day. Indeed, if the grievor had not been called for the short run, it seems he would have a legitimate grievance.

The grievor was properly called for a short trip at 0513 on January 29. The call was not answered, and repeated calls were made until 0532 when a missed call was registered. The grievor’s explanation for not answering was that he had been working on his furnace and had left his phone in the basement.

The grievor knew that missing or refusing a call creates a problem for the Company and for other employees below him on the call list. He did not keep himself available for a call as he should have and missed a proper call. There was just cause for discipline, and in my view 10 demerits did not go beyond the range of reasonable disciplinary responses to the situation. For the foregoing reasons, the grievance is dismissed.

The grievor’s record remains at 105 demerits.

E. Assessment of 20 Demerits

The grievor was assessed 20 demerits for “your refusal to comply with Company instructions as required in BCM No. 431865, and the letter dated July 12, 2019”. The grievor booked sick on June 26, 2019. On July 12 the Company sent him a message requiring him to provide specific medical information to OHS to validate his absence. This was a proper instruction, and the information was to be provided “as soon as possible, but not later than July 19, 2019”. The Union had asserted that the grievor had a disability that required accommodation and OHS was attempting to assess the medical concerns. The grievor made no timely response to this instruction.

On July 25 he booked back onto the spare board – apparently making no request for accommodation – and on July 27 gave his supervisor (not OHS) a note indicating he was fit to return to regular work. The note the grievor provided did not contain the information required, and of course the grievor did not comply with the time requirement.

There was, I find, cause for the imposition of discipline. There was no violation of any duty to accommodate, and no connection between the grievor’s illness and the imposition of discipline for a failure to provide information. While I have dealt with this grievance in a somewhat summary fashion, even if the grievance were to be allowed, the grievor’s record would still be well in excess of 60 demerits. This grievance, however, must be dismissed for the reasons set out above. The penalty is not excessive – the grievor had previously been disciplined for a similar offence, and his accumulated record

is bad. Accordingly, the grievor's record stands at 105 demerits, and he was subject to discharge.

October 29, 2019

A handwritten signature in black ink, appearing to read "J. F. W. Weatherill". The signature is written in a cursive style with a large initial "J".

**J. F. W. WEATHERILL
ARBITRATOR**