

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

CASE NO. 4715-D

Heard in Montreal, December 18, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal regarding the dismissal of Conductor B. Matyas of Moose Jaw, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, Mr. Matyas was dismissed which was described as *“Please be advised that you have been dismissed from Company Service effective January 18, 2018 as a result of your failure to fulfill your contractual obligations as evidenced by exhibiting patterned absenteeism on three (3) occasions (21-Nov-17, 01-Dec-17 & 16-Dec-17) with two (2) instances occurring on weekends. A violation of Canadian Pacific Attendance Management Policy. Notwithstanding that the above mentioned incidents warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal.”*

Union Position

The Union submits that Mr. Matyas 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 Company has failed to meet the burden of proof or establish culpability 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 asserts the T&E Availability Standards in Canada policy violates the Collective Agreement for reasons previously provided, and disputes its application in the instant matter.

The Union contends the discipline assessed to Mr. Matyas is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. It is also the Union's contention that the penalty as well as the Company's discipline policy is unreasonable and contrary to the Canada Labour Code. Accordingly, the Union requests the discipline be removed in its entirety, that Mr. Matyas be reinstated without loss of seniority and benefits, and that 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.

Company Position

The Company disagrees and denies the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Company disagrees and denies the Union's position.

The Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union states that the Company cannot assess discipline for use of the unfit clause. It remains the Company's position that the unfit clause is not to be abused or used to inappropriately obtain time off work.

The Company maintains that the discipline assessed was just, appropriate and warranted in all the circumstances. Additionally, the discipline was properly assessed in line with the Collective Agreement, Company Policy and the Canada Labour Code. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Union has filed a grievance on the T&E Availability Standards but has not brought it forth before an arbitrator. It is the Company position that the Union is in essence looking for two kicks at the can to arbitrate the same issue.

Not only is this a duplicity of action, but within the grievance at hand, the Union has failed to provide any rationale as to why the T&E Availability Standards are in violation of the Collective Agreement or how its application is contentious. It is not reasonable to expect the Company to respond to something which has not previously been provided.

The policy remains in effect and if the Union attempts to arbitrate it within the context of this grievance the Company reserves the right to properly respond.

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson

FOR THE COMPANY:

(SGD.) S. Oliver

Manager, Labour Relations

There appeared on behalf of the Company:

- S. Shaw – Senior Director, Labour Relations, Calgary
- D. Pezzaniti – Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairperson, Calgary
- D. Edward – Senior Vice General Chairperson, Medicine Hat
- B. Wiszniak – Local Chairperson, Moose Jaw

B. Matyas

– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

1. On December 27, 2017, Mr. Brent Matyas (the “Grievor”) was required to attend an investigation in connection with his:

“...work history in regards to your three (3) Unfit since your last Absenteeism Statement in October 2017”

2. Following the investigation, the Grievor was dismissed:

“...effective January 18, 2018 as a result of your failure to fulfill your contractual obligations as evidenced by exhibiting patterned absenteeism on three (3) occasions (21-Nov-17, 01-Dec-17 & 16-Dec-17) with two (2) instances occurring on weekends...notwithstanding that the above-mentioned incidents warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal.” (Company Tab 1)

3. The Grievor joined the Company on July 3, 2001. His disciplinary record (Company Tab 4) is alarming. On February 15, 2006, he was dismissed for a violation of Rule G but reinstated effective January 1, 2008 without compensation but with conditions. His entire disciplinary record is too long to be reiterated here, it will suffice to say that he had the following disciplines relative to attendance:

- April 24, 2009 – no discipline assessed but as noted by the word “other” it was raised with the Grievor that he had four sick occurrences for the period of January 1 to March 31, 2009 and that his mileage was within 15% of the bottom mileage for his area;
- July 8, 2009 – received a caution for absenteeism from May 10 to August 2, 2009 where he was off on four occasions which also indicated a pattern in his being absent before or after days off;
- July 22, 2011 – 30 demerits for his failure to respond to three voice mail messages to arrange for substance test as required by his employment contract;
- November 8, 2012 – He had five sick occurrences for the period of July 1, 2012 to September 30, 2012;

- October 8, 2014 – a 5-day suspension for absenteeism between January 1, 2014 and July 25, 2014 whereby he was off sick, unfit or unavailable for duty on 33 separate occasions;
- April 20, 2016 – a 5-day (deferred) suspension in connection with booking off sick after accepting a K36 assignment for duty;
- June 8, 2016 – a 7-day suspension (reduced to 3 days in Award 4715-B) for failing to report an injury;
- October 28, 2016 – a 14-day suspension (deferred) for missing two calls for duty and booking off;
- July 11, 2017 – a 20-day suspension (deferred) (4715 C above) for booking unfit October 5, 6, & 7, 2017.

4. Here, the Grievor booked Unfit on Tuesday, November 21 following two days of rest which preceded it (Saturday, November 19 and Sunday, November 20). In addition, he booked Unfit on Thursday, December 1 (on that day he saw a chiropractor for an apparent sore back). As a consequence, he was off work for that weekend, Friday December 2nd and Saturday, December 3rd). Thereafter, he had an off day booked for rest on December 15 but thereafter booked Unfit on the 16th.

5. In the investigative statement, the following Questions and Answers occurred:

Q8: *Do you realize that two (2) of the three (3) instances fell on a weekend?*

A8: *Yes*

Q9: *Do you understand that the Company sees this as a pattern of book offs?*

A9: *I don't know how the Company perceives this.*

Q10: *Can you please explain why you were Unfit at 2216 on November 21st as you had tied up 1751 on the 19th?*

A10: *I was fatigued before I was called for my shift so I booked off, because I did not feel I was properly rested to do my job safely.*

Q11: *Do you understand that with booking Unfit on the 21st it resulted in you being off work for approximately eighty (80) hours or three (3) days?*

A11: *Yes, according to Appendix B I was off for the length of time stated, however, I was booked back on and available to go to work. However, I cannot control the line-up and when I will be called.*

6. On extending his time off on December 1 and 16, 2017, the Grievor stated the following:

Q12: *Can you please explain why you were unfit at 0912 on December 1st, as you had tied up 0925 on November 29th?*

A12: *I was unfit for duties, and went to chiropractor due to a sore back.*

Q13: *Do you understand that with booking unfit on the 1st it resulted in you being off work for approximately hundred twenty-five (125) hours or five (5) days?*

A13: *Yes according to Appendix B I was off for the length of time stated, however, I booked back on the following day and available to go to work. However I cannot control the line-up and when I will be called.*

Q14: *Can you please explain why you were unfit at 1536 on December 16th, you had tied up 1650 on December 15th?*

A14: *I was fatigued and not ready to perform my duties in a safe manner.*

Q15: *Do you understand that with booking unfit on the 16th it resulted in you being off work for approximately fifty-eight (58) hours or two and a half (2.5) days?*

A15: *Yes according to Appendix B I was off for the length of time stated, however, I was booked back on and available to go to work. However I cannot control the line-up and when I will be called.*

7. The Company suggests that it is not credible for the Grievor - coming off significant rest periods - to allege being fatigued and unable to perform his duties. Further, it asserts that the Booking Unfit clause to attend to a chiropractic appointment – as the Grievor did - is outside of the intention of Article 36 and, as such, represents a reason for discipline.

8. Article 35.01 reads as follows:

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

9. The history of the Unfit clause is well known to all of the parties.
10. The Union essentially takes the position that, by definition, an employee who books off Unfit cannot be disciplined for the same. The Company argues that in so far as the clause appears in the award of Arbitrator Kaplan under the heading “*Fatigue Management*”, it should be read as relating to fatigue management rather than to provide a *carte blanche* excuse for an employee to avoid work whenever he/she decides to do so.
11. In a T& E Information Bulletin sent to all employees (Company Tab 13), the Company sets out its clear expectations with respect to the parameters of booking Unfit. It includes the following:
- “The Booking Unfit clause is not to be abused or used in a way which undermines the intent of this provision nor is it intended to provide employees with an ability to absent themselves from duty for no specific or valid reason unrelated to “fatigue management”.*
- Where it can be demonstrated that employees are abusing the unfit clause by way of excessive usage without valid justification or **where problematic behavioral patterns clearly exists** the Company reserves its right to thoroughly review each case and formally investigate.” (Emphasis added)*
12. The Union argues that the T&E Bulletin cannot apply when booking unfit as per Article 35 and disputes its application in the instant case.
13. The Company points out in its Ex *Parte* statement that the Union filed a grievance on the T&E Information Bulletin but has not brought it forth to arbitration. It

asserts that consequently the Company's policy remains in effect to be applied as written.

14. It argues that, in the circumstances of this case: (i) the Grievor booking Unfit to attend a chiropractic appointment is at odds with the intention of the Unfit clause and represents a breach of the corporate policy as contained in Tab 13; (ii) the occasions where the Grievor booked Unfit in November and December, represent a clear breach and abuse of Article 35; and, (iii) in all events they represent the kind of problematic behavioral patterns which the Company reserves the right to formally investigate as per the T&E Bulletin of which the Grievor was aware.

15. I do not disagree with the Union's perspective that the Book Unfit clause is specifically designed to ensure that an employee is rested and fit for work and that an employee is entitled to rely on the clause in appropriate circumstances without fear of discipline.

16. That said, Article 35 was not intended to serve as a shield for the Grievor to engage in inappropriate booking off conduct that represents a breach of his obligations to the Company.

17. It would be inconsistent with practical realities to accept that Article 35 was intended to provide an employee with a *carte Blanche* right to utilize Article 35 solely to accommodate his/her own interest and without regard for the propriety or necessity to

invoke it. This is particularly so when Article 35 is repeatedly invoked in a manner that reflects pattern absenteeism to extend weekends or days off.

18. For our purposes, I am not required to address the specific issue of whether or not the rationale or motive behind an employee invoking Article 35 can be directly questioned. The issue here is whether the Grievor's manifest conduct in booking unfit after two rest days, and using the Unfit clause to attend at the chiropractor's office (when he knew – as reflected in his answer to Q.9 in **CROA 4715-C** – that Medical and Unfit leave were different), represents an abuse of the his obligations to the Company in that they constitute pattern absenteeism which breaches the Company's T&E policy directive.

19. Even leaving aside the chiropractor's visit, the days off taken by the Grievor on November 21 and December 16 represent a pattern of absenteeism which exhibits the "*problematic behavioral pattern*" alluded to in the T&E Information bulletin.

20. Given the Grievor's record and the attempts by management to address his conduct in a proactive manner with progressive discipline, I am satisfied that the Grievor's conduct is disciplinable and, in fact, represents a culminating incident for which dismissal can be invoked.

21. The question is, what is the appropriate discipline? The Grievor will soon be 50 years of age. He will have worked with the Company since July 2001. Nineteen (19) years of service is significant.

22. The Grievor has been given ample opportunity to rectify his behavior and, rather than do so, he appears instead to have honed his ability to take days off to suit his purposes. Having denied the impugned conduct and shown no regret or remorse, there are frankly no other mitigating factors outside of his length of service.

23. Although I am satisfied that the Company has used progressive discipline to its optimal effect, I believe that the issue can be addressed by providing the Grievor with one final opportunity to rectify his behavior and become a valued employee.

24. Accordingly, the grievance will be allowed in part. The Grievor's dismissal shall be set aside and he shall be reinstated without compensation and without loss of seniority on the following strict conditions:

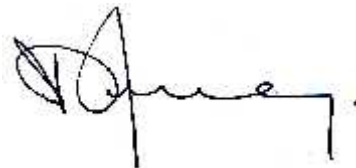
i) For the first two years following his reinstatement, the Grievor shall be required to register a rate of attendance at work which is no less than the average of his peers. Should he fail, during any quarter during that two year period, calculated on a rolling basis, to register a rate of attendance 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 relevant attendance of the other employees.

ii) Before reinstatement takes effect the Grievor must:

- a. Contact Health Services within one week of the receipt of the Award to commence his return to work.
- b. Submit to a Health Services directed Safety Sensitive medical assessment, which may include a return to duty substance test, and any other medical assessment deemed necessary under the terms and conditions directed by the Health Services Department (HS). Arrangements for these assessment(s) will be made as soon as possible through HS.
- c. Comply with any medical requirements HS determines to be necessary.
- d. Be determined to be medically fit to return to service in a Safety Sensitive position by the Chief Medical Officer or his designate.
- e. Successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing attendance expectations regarding the Grievor's return to work and to provide a full understanding and clarity regarding these expectations. If he desires, an accredited representative may accompany the Grievor to this interview.

25. I will retain jurisdiction with respect to the application, interpretation or implementation of this award.

February 28, 2020



RICHARD I. HORNUNG, Q.C.

ARBITRATOR