CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4852

Heard in Montreal, August 8, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appeal of the assessment of 59 demerits to the personal record of Locomotive Engineer David Haraldson of Winnipeg, MB. for - "your failure to abide by Manitoba's Public Health Orders during your participation in the Anti Mask Rally that took place at the Winnipeg Forks on Sunday, April 25, 2021, thereby putting the health and safety of your co-workers at risk".

UNION EXPARTE STATEMENT OF ISSUE:

Mr. Haraldson has been accused of failing to abide by the Manitoba Public Health Orders by attending an anti-mask rally at the Winnipeg Forks on Sunday, April 25, 2021, thereby putting the health and safety of his co-workers at risk. On June 10, 2021, Mr. Haraldson attended a formal employee investigation regarding the accusation for which he was subsequently assessed 59 demerits.

During the Formal Employee Statement, the evidence offered by the Company to support their allegation against Mr. Haraldson is a low-resolution copy of a picture, apparently produced from a single frame taken from a video, that depicts the lower portion of a man's face and the upper portion of his body. Mr. Haraldson denied that the image represented evidence that he was in attendance at the function, as alleged by the Company. The Company has failed to disclose the source of the evidence and thereby allow Mr. Haraldson or his Union representative to question the provider. The Union has concerns regarding the provenance of the Company's evidence and questions the document's veracity.

Additionally, when the Company alleges that Mr. Haraldson was in attendance at the function, he had been held out of service with the Company on another matter since approximately April 14, 2021. The only occasions that Mr. Haraldson was on Company property and in close contact with any other CN employees was during the multiple Formal Employee Statements to which he was summoned by the Company, held between May 13, 2021, and June 11, 2021. After the investigations, Mr. Haraldson continued to be held out of service until his discharge on June 22, 2021.

It is the Union's position that the discipline assessed to Mr. Haraldson is discriminatory, unjustified, unwarranted, and that if the discipline is warranted, it is extremely excessive in all the circumstances, and that the Company has not considered the significant mitigating factors

evident in this matter and that the penalty assessed is contrary to the arbitral principles of progressive discipline.

It is also the Union's position that the discipline assessed in this instance must be expunged as a result of the Company's violation of the fundamental rights afforded Mr. Haraldson in accordance with Article 86 of Collective Agreement 1.2 and that Mr. Haraldson is immediately returned to service without loss of seniority and made whole in all respects.

The Company disagrees with the Union's positions.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Haraldson attended an Anti-Mask Rally at the Winnipeg Forks on April 25, 2021 in contravention of Manitoba's Public Health Orders and putting the health and safety of his co-workers at risk. Mr. Haraldson attended a formal investigation regarding the incident and was subsequently assessed 59 demerits.

The Company produced a video, from which it captured a still frame, with a man resembling the Grievor at the Anti Mask Rally. The Union did not contest the quality of the video. In his formal investigation, the grievor did not deny that it was him in the video/photo but rather provided the same deflective answer to the majority of the quests posed to him.

Given the seriousness of the pandemic during this period of time, the Grievor's attendance at the Anti Mask Rally put the health and safety of his fellow co-workers at risk. As the Grievor had no scheduled time off in this period, he would have returned to work at his next scheduled shift following the rally. However, due to ongoing investigations, the Company had held the Grievor out of service over this period.

The Union disagrees with the Company's position.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) K. C. James	**(SGD.) L. Dodd** (for) **D. Klein**
General Chairperson	Senior VP Human Resources

There appeared on behalf of the Company:

L. Dodd	– Manager, Labour Relations, Winnipeg
M. Boyer	– Senior Manager, Labour Relations, Montreal

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
K.C. James	– General Chairperson, Edmonton
T. Russett	– Vice General Chairperson, Edmonton
K. Ilchyna	– Local Chairperson Division 583, Winnipeg
R. Finnson	– Vice President, TCRC, Ottawa
D. Declercq	– Secretary, Winnipeg (via Zoom)
D. Haraldson	– Grievor, Winnipeg (via Zoom)

AWARD OF THE ARBITRATOR

Background

1. The grievor is a 59 year old Locomotive Engineer, with thirty-three (33) years of seniority at the time of his dismissal in 2021.

2. He was dismissed for an accumulation of demerit points over 60 points.

3. On April 25, 2021 he is alleged to have attended an outdoor Anti-Mask Rally at The Forks in Winnipeg. After an investigation, he was given 59 demerit points for having disobeyed both Provincial and Company public health guidelines and endangering the health and safety of his fellow employees.

Issues

- **A.** Did the employer establish that the grievor attended the Rally?
- **B.** Did the employer establish that in so doing, he had endangered the health and safety of his fellow employees?
- **C.** Is a 59 demerit penalty appropriate?
- **D.** If Issues 1 and 2 are found not to be established, is the grievor entitled to reinstatement or only damages?

A. Did the employer establish that the grievor attended the Rally?

Submissions of the parties

4. The employer argues that the presence of the grievor at the Rally was established by a photo or screen shot taken from a video found on a social media site of a fellow employee.

5. The employer notes that the grievor never denied that the photo was of him, although he never admits that he attended the Rally or that the photo was of him.

6. The Union notes that there is no admission that the grievor was at the Rally and that fellow employees, who admittedly did attend the Rally, were never even questioned about the presence of the grievor.

7. The Union argues that it repeatedly asked for a copy of the video and was only given a copy shortly before the hearing. It argues that without the video, it has not been given a proper opportunity to respond to the discipline and that the CROA jurisprudence has found that this renders the discipline void ab initio (cite U CROA cases, Sask CA).

Decision

8. The employer has the burden of proof to establish that the grievor attended the Rally. The only evidence on which it can rely is a screen shot taken from a brief video, which shows the lower half of a face and the top of a torso.

9. There were multiple ways to establish that the partial photo was indeed of the grievor. The investigator could have done any of the following:

1) The screen shot could have been corroborated with other pictures or video of the grievor;
2) Evidence could have been sought from Mr. Purpur, the person who took the video and is a CN employee;
3) Evidence could have been sought from other CN employees, who admittedly did attend the Rally, whether they had seen the grievor at the Rally;
4) Evidence could have been sought from other sources, such as TV or social media platforms, whether the grievor was seen in other photos or videos taken at the Rally.

10. None of these things were done, such that the employer is left with a single partial photo as the evidentiary basis for the discipline.

11. I find that the Company has not established beyond a reasonable doubt that the grievor attended the Rally.

12. Even the use of the partial photo is highly problematic, as it comes from a video in the possession of the employer in April, 2021, prior to the Investigation. Inexplicably, it was only released to the Union more than two years later, shortly before the hearing, despite repeated requests for the video from the Union. While it is true that the Union was shown a copy of the video at the time of the discipline hearing, it is entitled to the actual video under the terms of the collective agreement and the CROA rules pertaining to a proper investigation. Failure by the Company to provide this evidence can render the discipline void ab initio (see CROA 3322 and CROA 4558 at Tab 10, Union documents).

13. As Arbitrator Sims decided in **CROA 4558**:

> The CROA system is a longstanding, unique, and consensual modification of that "normal system". By a combination of collective agreement terms (specific to each bargaining relationship) and adherence to the rules and procedures of the Canadian Office of Railway Arbitration, the parties allocate part of the "due process responsibilities" to the workplace and other parts to the CROA panels. The CROA panels that carry responsibility for the resulting decisions can only ensure that overall due process is met by requiring the parties to adhere strictly to their part of the due process bargain. This is not just a matter of contract law, but of the administrative law rules that ensure that the basic elements of fairness such as those described above, are met in individual cases.
>
> CROA panels achieve this by ensuring that the parties comply with the pre-termination rules they have themselves agreed to. But it is not only that they have agreed to them, it is because such agreements, despite the variety in content, are essential to the workings of the broader CROA system the parties have adopted. There is also another bargain between the parties that supports this.
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> > The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigation officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.
> >
> > *CP Rail and CAW- TAC Canada Rail Division, Local 101*
> >
> > (Unreported decision, Picher, Oct. 26, 1992)
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> Breaches of the collective agreement pre-discipline due process terms go to the core of the CROA process. They are not (if fundamental) just oversights that can be excused because a full *de novo* arbitration hearing might be thought to rectify the breach. Again Arbitrator Picher's comments in CROA 1734 and 3022 apply.

14. Here, the Union was deprived of the source of the key and only piece of evidence about the presence of the grievor at the Rally. It was deprived of the right to question the taker of the video. The video was in the hands of the Company for some two years and only produced on the eve of arbitration. This is not how CROA is intended to operate, according to the agreement between the parties. Had it been necessary, I would have found that the discipline, based on a screen shot from the video, was void ab initio.

B. Did the employer establish that in so doing, he had endangered the health and safety of his fellow employees?

12. Even if I had found that the Company had met its burden of proof concerning the presence of the grievor at the Rally, the Company must also establish that his presence at the Rally would have endangered the health and safety of his fellow employees.

13. The Company argued that the grievor had not booked time off in the ten days after the Rally, when the grievor would have been potentially contagious. It argues that he could have come back to work at any time, bringing contagion to the workplace. It does note, however, that the grievor had been held off work for investigations into other matters.

14. The Union argues that he had been held off work since April 14, 2021 and only attended the workplace for various investigation meetings on May 13, 14 and June 4 and 10, after the period for any danger of Covid transmission from the Rally. It argues that there was no chance that the grievor could have come back to work until the multiple investigations were complete. In reality, his employment was terminated and he never went back to work.

Decision

15. I accept that the Company was and is required to take all reasonable steps to protect its employees from the dangers of Covid-19, including from coming into contact

with potentially contagious fellow employees. Indeed, Arbitrator Hodges in AH 774 recently upheld the dismissal of an employee who attended at work with Covid-19 like symptoms, despite the fact that testing ultimately determined that the employee was not positive.

16. In another CROA decision, I recently held that the responsibility to meet public health requirements falls on both the Company and the individual (see CROA 4842).

17. Here, however, I find that the facts support the position of the Union. The grievor was held off work pending multiple investigations. He could not have come back to work in the circumstances. The first time he was allowed on CN property was May 13, 2021, after the infectious Covid period would have passed. Therefore, the grievor could not have endangered the health and safety of his fellow employees.

C. Is a 59 demerit penalty appropriate?

18. Given my findings on Issues 1 and 2, no demerits are warranted.

19. Had I found otherwise, I would have compared discipline meted out to other employees who attended the Rally. I would have looked carefully at whether the very significant differential in discipline between the grievor and other employees was justified.

20. However, I need not decide this matter, in light of my earlier findings.

D. If Issues 1 and 2 are found <u>not</u> to be established, is the grievor entitled to reinstatement or only damages?

21. The Company pleads that the grievor has the second worst discipline record of all employees. It pleads that he never accepts blame and constantly deflects all issues on to others. It argues that the grievor clearly distrusts the Company, and that the Company has lost trust in him. It seeks a damages award, rather than reinstatement, in light of these longstanding issues.

22. The Union pleads that this amounts to a new argument, not previously advanced by the Company in the grievance process. It states that it should be afforded an opportunity to fully plead to this issue, should the parties not be able to resolve it themselves.

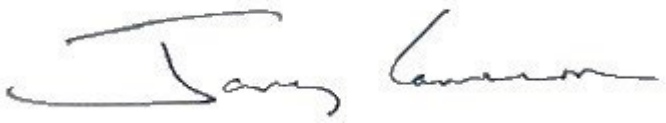
Decision

23. I accept that the parties should be given the opportunity to discuss this matter more fully.

Conclusion

24. For the reasons given above, I find that the Company has not met its burden of proof with respect to establishing just cause for the awarding of 59 demerit points to the grievor. The grievance is therefore allowed, with the issue of remedy to be returned to the parties.

25. I retain jurisdiction with respect to the implementation of this Award, together with the issue of remedy, should the parties not arrive at an agreement between themselves.



September 18, 2023

JAMES CAMERON
ARBITRATOR