CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4855

Heard in Montreal, August 10, 2023

Concerning

CANADIAN PACIFIC KANASAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issue giving rise to this dispute is Mr. P. Proudlock ("the Grievor") of Toronto, Ontario refusing to take transportation to his rest facility in Smiths Falls, Ontario under the right to refuse unsafe work, following his tour on train 118-31 on April 4, 2020 and coincident loss of earnings.

JOINT STATEMENT OF ISSUE:

On April 4, 2020, Mr. Proudlock worked train 118-31 from Toronto, Ontario, (Home Terminal) to Smiths Falls, Ontario (Away From Home Terminal). Upon his arrival, Road Foreman Steve Doyle was to transport Mr. Proudlock and his Conductor to the hotel where he would rest and await his return trip to Toronto.

Mr. Proudlock, refused to enter the crew transportation vehicle, self-identifying this as unsafe work under Part II, Section 128 "Refusal to work if danger" of the *Canada Labour Code ("Code")* based on his concern that physical distancing could not be maintained while being transported.

Mr. Proudlock was transported to the hotel in Smith Falls separately from his Conductor.

On the morning of April 5, 2020, after accepting a call for train 113, Mr. Proudlock again refused transportation based on his concerns under s. 128 of the *Code*. Later on April 5, 2020, Mr. Proudlock was transported back to Toronto via a trailing locomotive on train 143.

An Employee and Social Development Canada (ESDC) Official appointed by the Minister of Labour initiated an investigation into Mr. Proudlock's concerns on April 5, 2020 and determined that a danger did not exist.

Union Position

The Union contends the discipline assessed is unwarranted in the circumstance and a breach of the *Code*.

Mr. Proudlock was placed on Company Business by the Company, replaced for the return trip to Toronto by the next available Locomotive Engineer, only to deadhead later on the next train. He was not remunerated for this trip, nor was he paid held away for his time held at the away from home terminal. He continued to be held on Company Business until 16:35 on April 6, 2020, missing another complete round trip to Smiths Falls.

The Union contends that the Company has violated s.147 of the *Code* by imposing a financial penalty on Mr. Proudlock in retaliation of his invoking Part II, s. 128 "Refusal to work if danger" of the *Code.* The Company's Senior Vice President Tracy Miller even states he is not being paid as *"…You were off because of a self-created issue, so not entitled to any pay."* A clear breach of the *Code*.

The Union maintains the Company has violated the *Code*, Part II Sections 128, 128.1 and 147. These provisions of the *Code* are designed to ensure there is a means to address unsafe or dangerous situations without fear of reprisals which can take the form of "…dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee…" In this instance, the Company withheld Mr. Proudlock and by consequence, imposed a large financial penalty against him.

The Union requests Mr. Proudlock be made whole for any and all time missed including benefits, as a result of the Company withholding him from service for his invoking his right to refuse unsafe work. Further, given the Company's flagrant violation of the *Code* in the form of reprisal, the Union seeks damages in the amount of $10000.00 to dissuade further breaches of the *Code*.

The Company failed to respond to the step two appeal in violation of Article 40.02 of the Consolidated Collective Agreement and the May 29, 2018 Agreement on management of Grievances which prejudices the Union as we are unaware of the Company's position with respect to the violations.

Company Position

The Company disagrees and denies the Union's request.

Respecting the Grievor's refusal to enter the crew transport vehicle on April 4 and April 5, 2020 based on his concerns raised under s. 128 of the *Code,* the Grievor did not work pending a ruling rendered by the ESDC Health and Safety Officer. The Company maintains this was a proper application of the *Code* and required in order for the Grievor's concerns to be properly reviewed and addressed. This in no way constitutes discipline against the Grievor.

A Canada Industrial Relations Board (CIRB) decision was released on June 24, 2021 wherein the Board upheld the ESDC Health and Safety Officer's finding of no danger. The Company maintains the Grievor's work refusal was unfounded and he is not entitled to any compensation.

In regards to the Union's request for damages, the Company maintains that the Union has provided no support to their claim. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible, malicious, as well as extreme in nature. The Company maintains no such conduct has occurred in the instance and therefore the Union's claims are without merit.

In regards to the Union's allegations concerning the grievance correspondence, as per the grievance procedure the remedy for a failure to respond is escalation to the next step. This has occurred and the Company's position has been provided.

The Company maintains that no violation of the Collective Agreement nor the *Code* has occurred, the Grievor is not due any additional compensation and requests the Arbitrator deny the Union's grievance in its entirety.

FOR THE UNION:
(SGD.) E. Mogus
General Chairperson

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director, Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
L. McGinley	– Director, Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
E. Mogus	– General Chairperson, Oakville
J. Bishop	– Senior Vice General Chair, MacTier
R. Finnson	– Vice President, TCRC, Ottawa
J. Hnatiuk	– Senior Vice General Chairperson, Calgary
P. Proudlock	– Grievor (via Zoom), Toronto

AWARD OF THE ARBITRATOR

Background

1. The grievor, Mr. Proudlock, worked as a Locomotive Engineer for nearly thirty (30) years with the Company, retiring in August, 2022.

2. At issue is a pay dispute arising from a work refusal by the grievor under s.128 of the *Canada Labour Code*, when he refused crew transportation to and from the Away From Home Lodging Terminal.

3. The grievor is claiming lost pay of $3,080.39 while he was withheld from service during an investigation by the ESDC Safety Officer. The Safety Officer issued a “no danger” decision, which was upheld by the CIRB. The grievor has filed a further complaint with the CIRB, the hearing of which is pending.

4. The Company, while disputing that any money is owing, has made a unilateral payment of $2,082.89.

5. The revised claim is therefore for $997.50 as well as for $10,000 in damages.

6. I do not need to consider whether the work refusal was justified, as this is dealt with by the CIRB.

Issues

A. Is the grievor entitled to claim for lost wages under the Canada Labour Code?

B. Is the grievor entitled to claim damages for the discipline imposed?

C. Is the grievor entitled to claim $10,000 in damages for breach of the Canada Labour Code?

A. Is the grievor entitled to claim for lost wages under the Canada Labour Code?

Submissions of the parties

7. The Company submits that no money is owing, as the grievor refused to work by refusing to take the provided crew transportation to the station.

8. It further submits that there were multiple alternatives available to the grievor, if he did not wish to use the provided crew transportation, including walking the short distance to the terminal, or getting other transportation.

9. The Company notes that the train to which the grievor was assigned is a 100 series train, which is a premium service involving tight time lines and multiple crew changes across the country. It could not wait for the grievor and hence the trainmaster assigned another LE to replace the grievor.

10. The Union submits that the Company is breaching the Code by imposing a financial penalty on the grievor, as he would have received this pay “but for” the work refusal.

11. It notes that the withholding of pay amounts to discipline, particularly in light of the exchanges between the Senior VP and the grievor. It argues that no investigation was held, such that the discipline under the Collective Agreement and CROA Rules must be considered void ab initio.

12. It further submits that the coding used of “Held off on Company Business” gives the grievor the right to pay.

Decision

13. The purpose of Part II of the Code is to prevent workplace accidents, injuries and illnesses:

> Prevention of Accidents, injuries and illnesses
> 122.1 The purpose of this Part is to prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses arising out of, linked with or occurring in the course of employment to which this Part applies.

14. The Code prohibits employers from reprisals against employees who have exercised their rights to refuse unsafe work:

> Disciplinary Action
> General prohibition re employer
> 147 No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee’s rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
> (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
> (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
> (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

15. In Paquet v. Air Canada 2013 CIRB 691 (see Tab 17, Union documents), a decision of Vice-Chairperson Clarke, as he then was, a three part test is set out for the Board to find a Code violation:

1) Did the employer impose, or threaten to impose, a penalty?
2) Was the employee participating in a Part II process?
3) Did a nexus exist between the Part II Process and the employer’s penalty?

16. Section 147 prohibits financial penalties being imposed on employees exercising their rights under Part II of the Code:

> No employer shall…impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked….

17. Here the grievor had exercised his rights under Part II of the Code on the initial trip from the station to the hotel. The following morning, he again refused crew transportation for the same reason. In my view, it does not matter whether it is a continuing work refusal, as the Union contends, or a second refusal, as the Company sees it. The grievor clearly was participating in a Part II process, as he believed it unsafe to take the offered crew transportation.

18. The Company did not pay him for a period of time, until the ESDC investigation was complete. He therefore was not paid for a period where he would have earned income, but for the exercise of his rights under the Code.

19. There is clearly a nexus between the refusal, being held off work, and suffering a loss of income. In my view, the Company breached s. 147 by its refusal to pay the grievor the remuneration he would have normally earned.

B. Is the grievor entitled to claim damages for the discipline imposed?

Submissions of the parties

Preliminary Objection

20. The Company submits that prior to the exchange of Briefs, there was no claim of discipline being advanced by the Union and that it is now foreclosed from making the claim by CROA Rules and jurisprudence (see **CROA 4739**).

21. The Union submits that throughout the grievance process there is repeated reference to wage loss and discipline.

Decision on the preliminary objection

22. I note that the Step 2 Grievance refers to: “The Union contends the discipline assessed is unwarranted in the circumstances and a clear breach of the Canada Labour Code…The Union further contends Mr. Proudlock was effectually disciplined without an investigation contrary to Article 39.05. The discipline was in the form of a suspension”. It further makes reference to discipline concerning the exchanges between the grievor and senior Company officials.

23. I further note that the Union Ex Parte refers to “the discipline assessed is unwarranted” and “the Union requests that the discipline be substituted for such lessor penalty as the Arbitrator sees fit”.

24. In my view, the Union clearly raised the issue of discipline, both in the grievance process and in its Ex Parte submission. Accordingly, the preliminary objection is dismissed.

Decision on the claim for damages based on the discipline imposed

25. The Company submits that there was no discipline, no Form 104 and nothing placed on the record of the grievor. It simply was complying with the Code while a safety investigation was carried out.

26. The Union submits that the suspension, combined with the threatening tone of the communications from the Senior VP, amounts to discipline. It cites Natrel Inc., 136 L.A.C. (4th) 284 and Hamilton Community Care Access Centre (2006), 149 L.A.C. (4th) 340.

27. Given my earlier decision on the breach of s. 147 of the Code, I do not find it necessary to determine if any discipline was imposed. Had it been necessary, I find that the facts do not support a finding of discipline being imposed. While the exchanges between management and the grievor became testy, there is no indication that any sanction was ever imposed, beyond the loss of pay already addressed.

C. Is the grievor entitled to claim $10,000 in damages for breach of the Canada Labour Code?

Submissions of the parties

28. The Union claims that damages are necessary to dissuade the Company from further breaches of Part II of the Code.

29. The Company submits that there is no justification given for the claim and cites CROA 4605. It also cites Vorvis v. Insurance Corporation of British Columbia (1989) 1 SCR 1085 and Honda v. Keayes (92008) 2 SCR 362 for the proposition that punitive damages should only be granted in exceptional cases.

Decision

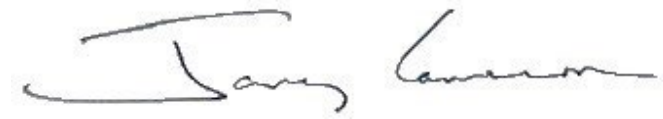
30. In my view, this is not an exceptional case, which calls out for punitive damages.

31. In April, 2020, the parties were at the beginning of the serious Covid-19 outbreak in Canada. This was a period when all involved were doing the best they could, in the face of ever changing conditions and medical guidance.

32. Mistakes were undoubtedly made on all sides, but this does not amount to behavior which attracts the penalty of punitive damages.

33. I decline to award punitive damages in these circumstances.

34. I remain seized with respect to the interpretation and implementation of this Award.



September 18, 2023

JAMES CAMERON
ARBITRATOR