

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

**CASE NO. 4894**

Heard in Montreal, January 11, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The dismissal of Conductor C. Audet of Kenora, Ontario.

**THE JOINT STATEMENT OF ISSUE:**

Following an investigation Mr. Audet was dismissed on March 23, 2021 for:

*“Submitting FM claims on days not worked which resulted in the generation of fraudulent payments, as evidenced by the claims you submitted between the dates of November 9, 2020 and November 22, 2020, inclusive. A violation of the CMC Honour System for T&E Employees, Bulletin LR-020-20 FM Familiarization Claim Instructions, and Bulletin LR-024-20 Your Pay – T&E Wage Claim Responsibilities.”*

On January 6, 2023, the Grievor was unilaterally reinstated with no compensation. As such, the period of time in dispute is from March 23, 2021 through to January 6, 2023.

**Union Position**

The Union contends that the investigation was not conducted in a fair and impartial manner under 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. Audet be made whole.

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

The Union requests that the discipline be removed in its entirety, and that Mr. Audet be reinstated without loss of seniority and benefits and 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 maintains the burden of proof has been met and that the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union.

In regard to the Union's contentions that the investigation was not conducted in a fair and impartial manner, the Company cannot agree. The Company maintains that the requirements under the Collective Agreement were met and the investigation had the essential elements of a fair and impartial investigation.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

**FOR THE UNION:**  
**(SGD.) D. Fulton**

General Chairperson

**FOR THE COMPANY:**  
**(SGD.) F. Billings**

Assistant Director, Labour Relations

There appeared on behalf of the Company:

- A. Harrison – Manager, Labour Relations, Calgary
- S. Oliver – Manager, Labour Relations, Calgary
- L. McGinley – Director, Labour Relations, Calgary

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairperson, CTY-W, Calgary
- J. Hnatiuk – Vice General Chairperson, CTY-W, Calgary
- H. Makoski – Local Chairperson, via video-conferencing
- C. Audet – Grievor, via video-conferencing

## **AWARD OF THE ARBITRATOR**

### **Preliminary Objections**

1. The Union makes two preliminary objections. The first is based on the obligation to provide a fair and impartial investigation, while the second is with respect to broadening the scope of the discipline.

#### **First Objection**

2. The first objection concerns the nature of the questions posed by the investigating officer to the grievor. The Union alleges that the questions posed were abusive, as the same questions were asked with respect to each of the five incidents, such that the process lasted some four hours. In addition, the Union alleges that certain of the questions were leading, and point to a prosecutorial, rather than an investigative, mindset on the part of the investigative officer.

3. The Company submits that the investigation was fair and impartial.

#### Analysis and Decision on first objection

4. It is clear that the grievor has a right to a fair and impartial investigation (See **CROA 2934** and **3322**).

5. There is no doubt that the questioning by the investigative officer was highly repetitive. It would have been possible for there to have been fulsome questioning about the first incident, followed by questions establishing that if the same questions were asked, the same answers would be given for the four other incidents.

6. In my view the repetitive nature of the questioning, in and of itself, did not render the investigation unfair or partial. The investigation is not a trial and the investigating officer is not a lawyer. Allowances need to be made. The questioning, while lengthy, was not abusive, as was the case in **CROA 4139**.

7. Some of the questions put by the investigating officer were also leading and presupposed a negative outcome. For example:

Q41 Do you consider your invalid and over claimed submission to be of critical importance to address and correct?

A41 Yes.

8. However, the number of improper questions was limited. Even these questions were answered fully by the grievor. I do not see any indication that these questions led to an overall investigation that was unfair or partial, unlike in **CROA 4139**.

9. Accordingly, this first objection is dismissed.

#### Second objection

10. The second objection concerns a document (see Company Tab 7) never put to the grievor during the investigation and only provided to the Union as part of the Company brief. The Union argues that this is a keystone document in the possession of

the Company, which should have been provided to the Union as part of its original request for documents. The Union therefore seeks that the discipline be found to be void ab initio, pursuant to **CROA 4083** and **4558**. The Union further argues that the Company, founding itself in part upon the contested document, is broadening the discipline by alleging that the acts of the grievor were intentional, when this had never been raised earlier. The Union seeks to have these arguments struck.

11. The Company submits that the contested document was only created in November 2023 and did not form part of the decision-making process to dismiss the grievor.

#### Analysis and decision on second objection

12. The CROA process, to which both sides have agreed, requires full disclosure and an investigation in which both sides have a role.

13. I do not find that the document detailing previous FM payments at Company Tab 7 to be a keystone document, the non-disclosure of which would void the discipline (see **CROA 4083**). The document was created well after the decision had been made to dismiss the grievor. At its highest, it was additional evidence produced in order to buttress existing arguments. However, the use of the document for the first time in the Company brief would clearly deprive the grievor and the Union from any opportunity to contradict it or bring other evidence. As such, I find that the document may not be used by the Company, and I will make no use of it in my deliberations.

14. I do not agree, however, that the Company has broadened the grounds on which it may rely for the dismissal of the grievor. The notion of intention must be inferred from the use of the term “fraudulent payments”, found in the dismissal letter (see Tab 1, Company documents). If the Company had indicated “mistaken payments”, the notion of intention might well be missing, but this is not the case. The term was used in the grievance response of the Company and is found again in the Joint Statement of Issue (see Tabs 2-3, Company documents).

15. Accordingly, this portion of the objection is dismissed.

## **Merits of the Case**

### **Context**

16. The grievor is a Conductor with four years of seniority working out of Kenora.

17. He was dismissed, as set out in the dismissal letter (see Tab 1, Company documents), for submitting FM claims on days not worked, resulting in the generation of fraudulent payments, the whole contrary to the CMC Honour System.

18. As the grievor has already been reinstated without pay, the remaining issues are whether discipline was appropriate, whether dismissal was excessive and if so, what the appropriate discipline should have been.

### **Issues**

- A.** Was discipline appropriate?
- B.** Was dismissal excessive?
- C.** If so, what was the appropriate discipline?

### **A. Was discipline appropriate?**

#### Position of the Parties

19. The Company places a great deal of emphasis on the fact that the Crew Management System (CMA), applicable to some 3200 train and engine employees, makes the employee their own timekeeper. Each of the approximately 50,000 paylines created each week is paid. While some of these claims will be randomly audited, the only way to ensure review is by filing an "Interpretation Code" (IP) with the wage claim, which is not paid until a review is made, unlike the standard claim, which is paid immediately.

20. The Company notes that employees are taught that making remarks such as “Please adjust” will not route the claim to a pay specialist. If employees are in doubt, they must consult with the Company, or file an IP.
21. Here, the Company states and the grievor admits that he claimed for time not worked and was overpaid some \$1000.
22. The Union asserts that the grievor made an honest mistake, confusing pay for familiarization with pay for training.
23. It notes that the grievor was not given a copy of the CMA manual in Kenora and was not given an opportunity to adjust the claims made. He clearly was not intentionally defrauding the Company, given his notation to “please adjust”.

#### Analysis and decision

24. There is no doubt that the grievor’s conduct was wrong. Indeed, he admitted that it was wrong and he offered to reimburse the Company for his improper time claims:

Q128: Do you have anything additional you wish to add to this statement?

A128: I apologize for creating claims I thought I was entitled to but wasn’t. I didn’t mean any malfeasance.

I had wrongly thought I was entitled to payment on days I hadn’t worked as if I was in training. I should have asked for further clarification from union officers or company officials. I in no way meant to claim payment for days I was not entitled to and even though I know its not proper process, I did write in my timeslips to ‘please adjust’ – I hope this shows my intent was not to steal from the company.

In closing I am sincerely sorry and apologize for this mistake. I try to diligently live my daily life with integrity and hold trust in working and personal relationships. I enjoy and appreciate my career with Canadian Pacific, I am proud with the work I do and integrity I put into my job and I will take every precaution against allowing this to happen again.

Q129: Do you have anything additional you wish to add to this statement?

A129: I am willing to pay back the \$1066.20 that I was not entitled too, going forward I will seek clarification with claims I am unfamiliar with.

25. The first step of the standard William Scott analysis is therefore met-discipline is appropriate.

## **B. Was Dismissal Excessive?**

### Position of the Parties

26. The Company notes that under Conduct Unbecoming Offences, the first entry is for “theft, fraud or the unauthorized taking of time or property”. It submits that the grievor committed fraud, in that he claimed for time not worked. The grievor cannot excuse himself by his entry of “Please adjust” on the time entries, which shows he had doubt about the entries, yet failed to do what the CMA requires, namely file an IP or to consult with the Company. The Company asserts that theft and fraud have always been viewed with the utmost seriousness in the jurisprudence.

27. The Union notes that the grievor has no other discipline for anything resembling fraud.

28. The Union emphasizes that discharge is outside the normal range of discipline, which usually results in demerit points or limited discipline. It points out that the bonds of trust were obviously not broken, given that the Company hired the grievor back, knowing all of the allegations against him.

### Analysis and Decision

29. While it is clear that the grievor’s conduct was wrong, it must be determined if dismissal was warranted in the circumstances.

30. One of the key criteria will be whether the wrongful conduct was intentionally wrong. This requires a careful examination of the training received by the grievor, and both his words and actions.

31. Firstly, the training on the CMA makes very clear that each employee is indeed his/her own timekeeper, and claims will be paid (see Tab 6-B, Company documents). It

should therefore make each employee very aware of the need for the utmost accuracy in the submission of claims:

#### The CMA Honour System

Under the Crew Management Application (CMA) Honour System all Running Trade Employees are responsible for their own payroll.

Timeslips are automatically approved and paid, and may be subject to audit at a later date, by a specially trained team at the Crew Management Centre in Calgary. As your own timekeeper, you are responsible for your timeslips (even if submitted by a fellow employee) and you must make every effort to understand and apply your collective agreement, Method of Pay and Local Rules to them. There are certain screens in the SMA that allow you to make your own adjustments (See "Adjusting Timeslips").

You are your own timekeeper.

32. In addition, the training makes clear making an IP or consulting with the Company before making a claim is critical in ensuring that accuracy:

#### The Interpretation Code (IP)

When to Use the Interpretation Code

1. You are unsure about interpreting the Collective Agreement Method of Pay (MOP) or Local Rules regarding your claim.
2. The CMA system does not accept the code you wish to use.
3. You have been instructed to do so because your submission relates to an outstanding grievance. These timeslips are coded with a number and held in an abeyance in-basket in CMA until the grievance is resolved.
4. You have been called on an incorrect profile in the CMA system and it cannot be adjusted by yourself to pay the correct miles and/or wages.

33. The training also makes clear that inserting a "Remark" on the CMA does not change the automatic paying of the time claim:

**Remember:** You alone are responsible for your timeslips, even if submitted by a fellow employee.

#### **Important:**

Comments such as "**please adjust**" within a timeslip **WILL NOT** route your ticket to an Audit Specialist for Review and it will not be considered an appropriate and justifiable manner with which to communicate a discrepancy in your wage claim.

In addition, if you are not sure of your entitlement to a claim submit an IP claim in the IP system to bring your issue to the attention of the Audit Specialist.



34. Secondly, the grievor admitted during the investigation that he had received training on the CMA and that he had used it for the last four years:

Q17: Referring to Appendix 5: Clayton Audet Time Slip Inquiry, are you familiar with and conversant with Page 8 of the Honour System Manual?

A17: Yes I do Understand.

Important: Comments such as “please adjust” within a timeslip WILL NOT route your ticket to an Audit Specialist for Review and it will not be considered an appropriate and justifiable manner with which to communicate a discrepancy in your wage claim.

In addition, if you are not sure of your entitlement to a claim submit an IP claim in the IP system to bring your issue to the attention of the Audit Specialist.

Q18: Do you understand the following?

A18: Yes.

Q19: In your own words, please describe what “you are your own timekeeper” means?

A19: It’s my responsibility to log the claims I’m entering into the system.

Q20: Referring to Appendix 2 – Honour System Manual T&E Canada – Page 26, it states:

Code Claim	Definition	Features	Type (miles/Time)	Routed=R non Routed =N	Adjustable
FM	Familiarization Trip (Road or Yard)	Stand-alone claim When familiarization in yard service or road service	\$	N	Y

Q21: Do you understand as a unionized employee of Canadian Pacific Railway, that you enter your claims under the Honour system which requires employees to take responsibility for wage claim submissions and that submissions must be submitted in a manner that reflects the collective agreement?

A21: Yes.

Q22: Do you understand that it is imperative with the CP Honour System that you use factual times, mileage and dollar amounts with submitting claims or data into CMA?

A22: Yes.

Q23: Do you understand that if while submitting claims into CMA, if you are not certain to your entitlement to a wage claim, you are

required to submit your payment request as an IP claim and/or reference the payment terms in the Collective Agreement, seek advice from CMA, appropriate company officer or Union officer?  
A23: Yes.

35. He denied, however, that he had any intention of doing anything wrong, and had inserted "Please adjust" in order to alert the Company if there was an issue:

Q127: Did you notice the overpayment in your payslip and did you report it to the Company?

A127: No because I thought it was correct and I remarked "Please adjust" which I thought the claims went to the auditor specialist.

36. However, the grievor's own actions are not helpful to his defence. He states that he added the Remark to alert the Company to a possible issue. However, in so doing, it shows that he had a doubt about the accuracy of the time entry. In that case, his training would have shown him that he should file an IP or consult with the Company. The training specifically sets out, in colour, that a "Remark" does not change the usual immediate payment.

37. Thus the training and experience of the grievor should have made it clear to him that when in doubt, as he clearly was, file an IP claim and not simply some "Remarks".

38. The issue remains, however, whether the grievor was careless, or whether he committed intentional fraud.

39. The standard of proof is that of the civil standard, based on "clear, cogent and convincing" evidence. As set out in Brown and Beatty, para. 7:13:

As a result, unless the agreement specifies otherwise, in cases involving allegations of particularly reprehensible misconduct, such as criminal or quasi-criminal behaviour, when an employee's reputation and future job prospects are at stake arbitrators typically use words such as "clear", "cogent", "convincing", "substantial", and "reliable" to describe the quality of evidence employers must adduce to justify whatever sanction they imposed. Subsequently, the Supreme Court of Canada ruled that there is only one standard of proof in all civil cases, and that is proof on a balance of probabilities, based on evidence that is "clear, cogent and convincing" relative to the gravity of the allegations being made. In each case the arbitrator must

decide, based on all the evidence, whether it is more likely than not that the alleged misconduct occurred.

40. As Arbitrator Schmidt noted in AH 639:

The allegation at issue is one of falsification of documents – a very serious allegation. Though I appreciate that the Company had reason to be suspicious of the grievor, the burden of proving falsification, an intentional and deliberate act meant to deceive the Company, is a high one. Falsification of documents must be proven on clear, cogent and convincing evidence. Though I too have my suspicions, I am not prepared to draw a legal conclusion of falsification based on the evidence before me. I am, however, prepared to find, on the evidence submitted, that by entering the testing as having been completed on August 14 and September 29, 2014, the grievor displayed a degree of wanton recklessness that is difficult to reconcile with the level of responsibility that the Company reasonably expects of the position of S&C maintainer. The evidence shows that the grievor did not think or care about the consequences of his actions.

41. The grievor was both wrong and careless in his time entries. However, I am not prepared to find, based on the evidence before me, that he committed intentional fraud. The grievor has no history of discipline based on any form of dishonesty. He was forthright in admitting that he had made mistakes in entering the time claims that he made. There is some degree of overlap between training and familiarization training, which could have led to some confusion. He offered to reimburse the Company, which has in fact taken place. Finally, the Company itself made a judgment call about the events, by reinstating the grievor. The “bonds of trust” have clearly not been broken (see CROA 4198 and 3409).

42. Accordingly, I find that dismissal was excessive in the circumstances.

**C. If so, what was the appropriate discipline?**

Position of the Parties

43. The Company has set out a number of cases where dishonest schemes or falsification resulted in termination (see CROA 4438, 4280, 2304, 2669, 2280 and AH 777), or reinstatement, but without compensation (see CROA 4764, 4198, 3409).

44. The Union has set out a number of cases where wrongdoing was found, but discharge was found to be unwarranted. In these cases, lesser discipline was imposed: (see CROA 3433, Arbitrator Picher, “an error of judgement bordering on recklessness”, 15 demerits and full compensation; CROA 3614, Arbitrator Picher, “careless”, 10 demerits and full compensation; CROA 4281, Arbitrator Schmidt, “some claims not honestly made”, 30 demerits and full compensation for 76 day suspension; AH 723, Arbitrator Hornung, “entered a wage rate that, at best, he was unsure of”, 45 day suspension without pay).

### Analysis and decision

45. In many respects, AH 723 is very similar to the case at hand. The grievor had made wage claims as a trainee rather than as a trainer. Arbitrator Hornung found as follows:

23. While I am given pause by his explanation regarding his failure to use *The Interpretation Code (CMA; p. 11)* - which specifically directs that employees submit an *IP Claim Code* in circumstances where they are unsure of their claims – and the fact that he submitted the correct amount on 21 previous occasions, that suspicion does not equate with satisfying me, on a balance, that his conduct rises to the level of fraud. Despite my reservations, I am unable to conclude that the Company has proven, on a balance of probabilities, that he deliberately engaged in making fraudulent wage claims. (See: **CROA 3409; 3614**).

24. The above said, although the Grievor’s conduct did not amount to a “*falsified*” wage claim within the conclusion arrived at by the Company in its Form 104, the Notices of Investigation served on the Grievor alludes to his alleged “*inaccurate*” claims. Given his past experience in properly completing similar wage claims on 21 occasions (Q.90, supra) and his admissions that he consciously entered wage rates which he anticipated would be audited, it is apparent that he purposely entered a wage rate that, at best, he was unsure of. As such he was in breach of the fundamental requirements of the *CMA Honour System* which obligates employees to be “*responsible for their own payroll*”. As his own “*timekeeper*” he is “*responsible for [his] time slips...and [is required to] make every effort to understand and apply [his] Collective Agreement, Method of Pay and Local Rules to them*”.

25. In fact, at page 9, the Manual expressly provides:

*If you are unsure of your claim, use the Interpretation Code (IP) to route directly to an auditor for interpretation.*

26. The Grievor's conduct, while not rising to the level of fraud, nevertheless constituted an intentional breach of the *CMA Honour System Manual*. As noted in

**AH 686** (page 15):

*... The Grievor's conduct affects not only his relationship with the Employer but brings into focus the larger issue of the integrity of the honor system. In order for the honor system to continue to operate effectively, it is incumbent on employees to ensure that their time is justified and appropriately entered. It is not sufficient to simply disagree with the Employer regarding the hours they believe they are entitled to and then, at the Grievor did, claim them.*

27. Submitting an incorrect wage claim under the *Honour System* is a serious offence. If employees generally engaged in a similar practice of entering a wage rate which they were unsure of or on which they expected to be audited, without taking the responsibility to accurately set out their wage entitlement or filing an IP, the consequences for the *Honour System* are self evident. The Grievor ought to have understood his obligations pursuant to that system. If he was uncertain of which code to enter, he ought to have contacted an appropriate Company or Union officer or made an appropriate *IP* claim.

28. As a number of previous CROA decisions have made it abundantly clear: the consequences of a breach of the Manual are intentionally severe in light of the unsupervised trust and independence bestowed on the employees to be their own timekeepers. In the circumstances here, anything other than a severe disciplinary response would invite similar conduct and fail to underscore the importance of the *Honour System*.

29. Considering the above, I would allow the grievance in part; reinstate the Grievor; and in place of his dismissal enter a suspension of 45 days without pay and without loss of seniority, for his for breach of the *Honour System*. The Grievor shall be made whole.

46. While the grievor in AH 723 had considerably more seniority than the grievor here, the same seniority would indicate far greater familiarity with the Honour System.

47. I agree with Arbitrator Hornung about the importance of strict compliance with the Honour System and significant consequences for a failure to do so.

48. Here the grievor was terminated March 23, 2021 and only reinstated January 6, 2023. A reinstatement without compensation would amount to a suspension without pay of 21 months. That seems like an excessive penalty in the circumstances of this case.

49. Equally, imposing only a limited number of demerit points with full compensation does not fully recognize the seriousness of the actions of the grievor.

50. I find that a 45 day suspension without pay and without loss of seniority, with the grievor otherwise being made whole, as was imposed in AH 723, is reasonable in the circumstances.

51. I retain jurisdiction with respect to the interpretation and application of this Award.

February 20, 2024

A handwritten signature in black ink, appearing to read "James Cameron". The signature is written in a cursive style with a long horizontal stroke at the end.

---

**JAMES CAMERON**  
**ARBITRATOR**