CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5092

Heard in Montreal, October 9, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Conductor P. Monte from the terminal of Halifax, NS.

JOINT STATEMENT OF ISSUE:

On March 26, 2024, Conductor Monte was discharged by way of CN Form 780 reading "For claiming hours not worked on January 4, 2024, and February 26th, 2024, to which you were not entitled, breaking the bond of trust with your employer.

Union Position:

It is the Union's position that the Company is in violation of Articles 82, 85, 85.5 and Addendums 124 of the 4.16 Collective Agreement along with considerable arbitral jurisprudence when the Company issued an outright discharge to Conductor Monte on March 26, 2024.

The Unions submits that the Company failed to hold a fair and impartial hearing as they violated Article 82.6 of the 4.16 Collective Agreement, among other Articles, when they failed to hold the investigation in a timely manner.

The Union contends that the outright discharge was unjustified, unwarranted, arbitrary and discriminatory.

The Union further contends that had the Company complied with the Collective Agreement, in particular Addendum 124, the grievor would still be gainfully employed as a Conductor.

The Union seeks to have Mr. Monte reinstated to his employment without loss of seniority and with full compensation for all wages and benefits lost given the violations of the Collective Agreement. In the alternative the Union seeks to have Conductor Monte returned to service in a manner that the arbitrator deems fit.

Company Position:

The Company disagrees with the Union's position. The Grievor was remunerating himself for shifts he did not fulfill as a Locomotive Engineer trainee which is a serious offence. All investigations were conducted in accordance with the collective agreement.

The grievor has a history of irregular time claims and was disciplined for the same reasons in 2022. The Grievor broke the bond of trust with CN.

It is the Company's position that no articles of the Collective Agreement, Canada Labour Code or jurisprudence have been violated.

Consequently, the Company is requesting that the Union's grievance be dismissed.

For the Union:	For the Company:
(SGD.) J. Lennie	**(SGD.) J. F. Migneault**
General Chairperson, CTW-C	Manager Labour Relations

There appeared on behalf of the Company:

J.F. Migneault	– Manager, Labour Relations, Montreal
L. Dodd	– Manager, Labour Relations, Winnipeg
C. Wolak	– General Manager, Champlain Division

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Brockville
E. Page	– Vice General Chairperson, CTY-C, Hamilton
M. Kernaghan	– General Chairperson, LE-C, Trenton
C. Wright	– Senior Vice General Chairperson, Barrie

AWARD OF THE ARBITRATOR

Context

1. **Issues**

   A. Is the discipline void ab initio, as a result of a violation of article 82 of the Collective Agreement?

   B. Is there just cause for discharge or discipline in the circumstances?

A. Is the discipline void ab initio, as a result of a violation of article 82 of the Collective Agreement?

Position of Parties

2. The Union argues that the discipline of the grievor is void ab initio, as the Company failed to respect the fundamental protections set out in article 82. It argues that: a) the Company failed to provide adequate notice of the charges; b) the Company failed to provide all evidence prior to the investigation and c) the Company failed to conduct the investigation in a timely manner.

3. The Company argues that proper notice was given to the grievor of the matters to be investigated, all evidence was provided to the grievor and the investigation was held in a timely manner.

Analysis and Decision

4. Article 82 of the Collective Agreement reads as follows:

> 82.1 Employees will not be disciplined or dismissed until the charges against them have been investigated. Employees may, however, be held off for investigation not exceeding 3 days and will be properly notified, in writing and at least 48 hours in advance, of the charges against them. Investigations, as contemplated under article 82.2, will only be scheduled to start between 0800 and 1700 hours, where the employee being investigated normally reports for duty, or as otherwise if mutually agreed upon between the Local Chairperson and the Company.
>
> 82.2
>
> a) Employees may have an accredited representative to appear with them at investigations, will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a transcript or audio recording of the statement taken at the investigation. At an investigation, the investigating company officer or the employees shall have the right to record, at their own expense, the investigation proceedings on a recording device. This provision will not be used to delay or postpone the investigation proceedings.
>
> b) An employee under Company investigation and/or his/her accredited representative shall have the right to attend any company investigation, which may have a bearing on the employee's responsibilities. The employee and/or their accredited representative shall have a right to ask any questions of any witness/employee during such investigation relating to the employee's responsibilities. At the outset of the investigation, the employee will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the employee and his representative to review the evidence.

> c) When the Local Chairman of the union requests a copy of the discipline history of an employee who has a pending investigation, the discipline history shall be provided.

5. CROA jurisprudence is clear that a breach of a fair and impartial investigation results in the discipline being held to be void ab initio, as was set out in by Arbitrator Picher in **CROA 3322**:

> It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void ab initio, regardless of the merits of the case. This means that the discipline being contemplated at the investigation will be completely stricken from the employee's records, because of this procedural flaw. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration.

6. However, the same arbitrator noted that the investigative process did not have to be conducted at the level of procedural rigour found before the Courts. As he noted in **CROA 2073**:

> *…disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that an investigating officer meet minimal standards or impartiality are the essential elements of the "fair and impartial hearing" to which the employee is entitled to prior to the imposition of discipline.*

7. The first Union argument relates to the notice provided to the grievor and whether it was adequate. The Notice to Appear noted that the investigation was in connection with "alleged time claim irregularities between November 23, 2023 and February 27, 2024" (see Tab 2, Union documents). The Union argues that the Company failed to provide

specific dates or particulars on the nature of the irregularities, although it alleges the Company should have known exactly which days were in issue.

8. The Union relies on **AH 521**, in which Arbitrator Picher decided:

> "Notice is one of the most essential rights and protections available to an employee facing disciplinary charges. It is, needless to say, important for an employee to know in advance the precise conduct or events which will be the subject of the investigation that may result in his or her discipline."

9. I agree with the statement of Arbitrator Picher. However, the statement was given in the context of a notice which was so broad as to be incomprehensible:

> "… (alleging) failing to meet your obligations as an employee on the following dates…" he or she is placed in the position of having to determine the nature of the offence alleged by surmise or inference, given that an individual's employment may involve any number of different "work obligations". That is plainly not the standard of clear notice intended as part of a fair and impartial proceeding within the meaning of article 82.1 of the collective agreement. With respect, the phrase "… alleged failure to meet work obligations …" could encompass a host of possible infractions ranging from absenteeism to insubordination to the use of alcohol or drugs in the workplace.

10. Here, by contrast, the notice identified time irregularities between certain dates. The grievor would immediately know that the issue was the proper entry of time between the dates in question. He could review his personal calendar and notes to verify what he had been doing during that period. He would also have access to his pay stubs for the period, to be able to match work and pay.

11. The Union claims that the Company knew and failed to reveal to the grievor, the precise days which were in question. However, the investigation highlights that multiple dates were the subject of questions and ultimately, only two became the focus of discipline.

12. In my view, the grievor had adequate notice of the subject of the investigation.

13. The second Union argument relates to an alleged failure by the Company to provide all information in their possession prior to the investigation. In particular, it argues that the documents provided prior to the second investigation (see Q and A 6 of the March 21, 2024 investigation) should have been provided during the initial investigation.

14. However, the Company arguments on this issue are more compelling. The Company argues that these new documents only became relevant as a result of the answers given during the initial investigation. For example, evidence as to the schedule of the grievor's on-line courses and testing only became relevant once the grievor claimed that he had been doing on-line courses on January 4, 2024 during the first investigation.

15. In my view, this new material was provided in response to the initial investigation, and the grievor was given sufficient time to review it prior to the second investigation (see Q and A 6-7).

16. The third Union argument is that the investigation was not done in a timely manner, taking place on March 18 and 21, 2024, concerning events between November 23,2023 and February 27, 2024. It points to the problem of delay affecting the "employee's ability to recall and reconstruct the events" (see **CROA 3011**).

17. However, I note that the delay in **CROA 3011** was of seven months duration, while the delay between January 6 and March 18 is 2.5 months, while the delay between February 26 and March 18 is some three weeks.

18. In my view, the delays here were not sufficient to prejudicially affect the grievor's ability to "recall and reconstruct events". I note that Arbitrator Schmidt in **CROA 4281** rejected a similar objection where the delay was for a period of some six months.

19. For the foregoing reasons, the Union objection is dismissed.

B. Is there just cause for discharge or discipline in the circumstances?

Position of Parties

20. The Company submits that the falsification of time claims is one of the most serious violations of the Code of Conduct. Such violations result in discharge of the offender, as the bonds of trust have been broken.

21. The Company argues that the grievor here made claims for pay for days he did not work, in circumstances where it could not have been simply a mistake. It points to a previous incident, where the grievor had admitted to time fraud and been disciplined for it.

22. The Company argues that the grievor claimed for and was paid some $650 to which he was not entitled, which has since been claimed back.

23. The Company submits that the discharge of the grievor was entirely appropriate and should not be changed.

24. The Union submits that the grievor was careless, and made an incorrect claim, but the Company has not met its burden of proof to show that there was intent to make a false claim.

25. The Union argues that the discipline is far too severe in the circumstances.

Analysis and Decision

26. CROA jurisprudence is well settled that intentionally submitting time claims for time not worked is a form of theft, meriting dismissal. As Arbitrator Picher noted in **CROA 2119**:

> "<u>It is well settled that an act of deliberate theft will generally be a dismissable offence, as it brings to an end the relationship of trust fundamental to the duties and obligations running between employer and employee (see CROA 1631). More particularly, this Office has previously found that falsifying timekeeping reports is tantamount to theft that justifies dismissal (see CROA 1184)</u>. In the

> Arbitrator's view there are no mitigating circumstances in the instant case which would justify a departure from the general principles stated. The Company is entitled to know that a person discharging the responsibilities of an Extra Gang Foreman, including the maintenance of unsupervised timekeeping records, must be free of any question as to his or her trustworthiness in that regard.
>
> Moreover, in the instant case, given the evasiveness and inconsistency of the grievor's attempted explanations of his actions, there is little reason to believe that any rehabilitative impact would be gained from a lesser penalty.
>
> For the foregoing reasons the grievance must be dismissed." (underlining added)

27. Arbitrator Picher came to the same conclusion in **CROA 1835**:

> "…As a running trades employee the grievor works in a form of service whose remuneration is based in part on time and mileage in circumstances which cannot be directly supervised by his employer. The grievor is, therefore, in a position of substantial trust with respect to the submission of trip tickets claiming the payment of his wages.
>
> <u>In the instant case the conduct of the grievor is a form of theft. It is trite to say that such conduct, particularly in a position where a relationship of full trust is essential to the nature of the job, the most serious measure of discipline is justified. Decisions resulting in dismissal have consistently been upheld by this Office in such circumstances (*see CROA 461, 478, 899, 1472 and 1474*).</u>
>
> In the circumstances the Arbitrator is compelled to conclude that the Company had reasonable grounds to terminate the grievor's services, in light of his deliberate act of fraud. No compelling mitigating circumstances are made out, and the grievance must therefore be dismissed." (Underlining added)

28. As I noted in **CROA 4869**:

> This case is not about whether the grievor claimed for and was paid for work which he did not perform. This clearly took place. During the investigation, the grievor confirmed that he had only worked a 12 hour shift on "a couple of occasions", despite charging overtime throughout the period in question (see Q and A 28-29, Tab 5, Company documents).

> This case is about whether there was intentional time theft, based on clear and cogent evidence, weighed on the basis of a preponderance of the evidence.

29. Both labour doctrine and CROA jurisprudence have consistently made a distinction between deliberate time theft and mistakes made in recording time. As Brown and Beatty, para. 7:13 have noted:

> A mitigating factor closely related to the potential of an employee to reform his or her behaviour is the employee's intention and state of mind at the time of the alleged offence. Premeditated and/or persistent wrongdoing is always regarded as more culpable than momentary lapses and those that lack a malicious intent.

30. The Company bears the burden of proof to establish that the wrongdoing was intentional. As Arbitrator Picher decided in **CROA 3187**:

> While the Arbitrator can appreciate the suspicion which the Company attaches to the circumstances surrounding the jacks which were in the grievor's possession, it remains the employer's obligation to prove the elements of deliberate theft, on the balance of probabilities. While inferences may certainly be drawn from circumstantial evidence, the evidence as a whole must be of a sufficient reliability to sustain a finding of wrongdoing on the preponderance of the evidence.

31. The Union cites **CROA 4894**, where the facts of the case were examined and the present arbitrator found no intent to steal or commit fraud, but did find wrongdoing:

> "The Union has set out a number of cases where wrongdoing was found, but discharge was found to be unwarranted. In these cases, lessor 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).

32. The Union also cites **CROA 4223, CROA 3433, CROA 3614, CROA 4281** and **AH 723**. In each case, the arbitrator analyzed the facts put forward in evidence, keeping in

mind that the Company bears the burden of proof, and made determinations that intentional wrongdoing had not been established.

33. Here it is clear that the grievor claimed for and was paid for time not worked on January 4 and February 26, 2024. I agree with the Company argument that the grievor is not entitled to pay unless he is working or available to work. Here, he was paid some $650 to which he was not entitled as neither working nor available to work, which has since been reimbursed. At issue will be whether the Company has demonstrated with "clear, cogent and convincing" evidence that the time claim was submitted <u>intentionally</u>, or as the Union contends, as a result of an innocent mistake.

34. With respect to the time claim on January 4, 2024, the grievor responded as follows:

> 16.Q. Mr. Monte, As per Evidence 3 (A), (B) and (C), Did you work assignment Y 50511-04 on January 4th, 2024 as student locomotive trainee?
> A. No.
>
> 17.Q. Mr. Monte, as per Evidence 3 (A), System generated email to OJY Warner notifying that as per your trainer Mr. Mark Rushton, <u>You did not work that day on assignment Y 50511-04. Can you comment?</u>
> <u>A. I was doing the pre-requisite for my mandatory online training. When I called in to crew office to book off, I was informed being under the student locomotive training status, I am unable to book off as I am shown to be placed. I brought it to TM Soliman's attention and made comment that I claimed it as an SLE training day.</u>
>
> <u>18.Q. Mr. Monte, As per Evidence 3 (B) and (C), Time slip was submitted for date worked on assignment Y 50511-04 on Jan 4th, 2024 with Employee remarks entered by you stating that were "SLE training". Referring back to your answer to Question1 7, why did you not put in the comment section the reasons mentioned above and instead you used SLE training while you were not training as an SLE?</u>
> <u>A. I typically do all my claims at the end of the two weeks period. I was going through the motion of putting them in a claim by claim and I typically used to copy and paste when doing my claims. I</u>

> made a mistake of putting it in as a normal ticket instead of being off on mandatory online Training. (Underlining added)

35. With respect to February 26, the grievor had no recollection of why he submitted a claim for a day not worked:

> 32.Q. Mr. Monte, as per Evidence 6(b) 1 2, A time slip submitted for working assignment Y50511-26 on Feb 26th, 2024 with comments entered in the employee remarks section "SLE Training". Can you comment?
> A. I do not remember that day.
>
> 33.Q. Mr. Monte, A time slip was submitted claiming that you worked assignment Y 50511-26 on Feb 26 and as per Mr. Craig Gesner statement that you were not working on that assignment. Can you comment?
> A. No.
>
> 34.Q. Mr. Monte, as per evidence 6 (A), Statement from Transportation supervisor Brett Backman stating that while he was observing the crew on 26th of Feb, 2024 you were not working on assignment Y50511-26. Did you work on assignment Y50511-26 as you were claiming by submitting a time slip claim for it?
> A. I do not remember honest.
>
> 35.Q. Mr. Monte, As per evidence 4 and 5, You were scheduled to work assignments assigned by OJT Warner, why are you not showing up to those assignments and you are putting time slips in the system for pay claiming working other assignments?
> A. I usually enter my claims towards the end of the pay period, whatever assignment that I am on that week it automatically shows up in my slips and I can not modify it.

36. In the subsequent investigation held on March 21, 2024, three days after the initial investigation, the grievor was shown evidence which demonstrated that he did not do online courses on January 4th:

> 10.Q. Mr. Monte, as per evidence #2, and specifically Question 17 on your last statement on Monday March 18th, 2024. You stated in your answer when asked to comment about you not being present on assignment Y50511-04 on Jan. 4th, 2024? That "I was doing prerequisite for my mandatory online training. When I called in to crew office to book off, I was informed being under the student

locomotive training status, I am unable to book off as I am shown to be placed. I brought it to TM Soliman's attention and made comment that I claimed it as an SLE training day".
Is this correct?
A. Yes
11.Q. Mr. Monte, As per evidence #2 and specifically Question 18 on your last statement on Monday Mar 18th, 2024. When asked why did you not put in the comment section the reasons mentioned above and instead you used SLE training while you were not training as an SLE, you stated that "I made a mistake of putting it in as a normal ticket instead of being off on mandatory online training".
Is this correct?
A. Yes.
12.Q. Mr. Monte as per Evidence 3, your invitation to join QSOC (Recertification online course) was for Jan 10 and Jan 11, 2024 and as per evidence 4, you emailed the CN campus confirming that you will be attending on those dates.
Is this correct?
A. Yes.
13.Q. Mr. Monte, As per evidence 5, CN campus records showing you doing all Mandatory online prerequisite course on Jan 1st, Jan 2nd and Jan 9th.
Is this correct?
A. Yes.
14.Q. Mr. Monte, As per evidence 2 and specifically your answer to Question 17, you stated that you were doing the prerequisite for your mandatory online training when asked to comment about you not working on assignment Y 50511-04 on Jan 4th, 2024. And as per evidence 3, 4, and 5, CN Campus records clearly showing you doing your prerequisite for your mandatory online training on Jan 1, Jan 2 and Jan 9th with no online courses being taken on Jan 4th. You did not work assignment Y 50511-04 and as per evidence 5, you were not on any online courses. Why did you put in a time claim pay for Jan 4th, 2024 claiming you have worked?
A. I do not remember.
15.Q. Mr. Monte, As per evidence 2 and 5, You did not work assignment Y 50511-04 and you did not complete any online training on Jan 4th, 2024. As per evidence 2 and specifically your answer to Question 18, you stated "I made a mistake of putting it in as a normal ticket instead of being off on mandatory online training." You claimed that you made a mistake putting the time slip for Jan 4th, 2024 as a normal ticket while it should have been being off on Mandatory online training. No record of you doing any CN related

> work that day. Why was a time slip entered for Jan 4th, 2024 claiming pay from CN?
> A. I do not remember.
> 16.Q. Mr. Monte as per evidence 2 and specifically Question 39. When union asked "Q2-Mr. Monte, as per company evidence 3(B), what date and time did you enter the time claim in relation to the Jan 4th, 2024 shift?" You answered, "A2-240108 at 0558". Mr. Monte, you entered a time claim on Jan 8th claiming pay for Jan 4th. Even if the time slip was entered almost 4 days later, does that justify putting a time slip claiming pay where no records of you working at all?
> A. I do not how to answer that. I am confused.
> Note. Union objects to the self incriminating question as the purpose of the investigation is to determine the facts.

37. With respect to time claimed on February 26, further evidence was provided that the grievor had not worked a shift on the day, but the grievor still had no recollection:

> 18.Q. Mr. Monte, As per evidence 2 specifically your answer to question 32. When asked if you can comment about putting in a claim for pay for working assignment Y 50511-26 on Monday Feb 26, 2024. your answer was that you do not remember that day. Is that Correct?
> A. Correct.
>
> 19.Q. Mr. Monte, As per evidence 2 6, You were scheduled to work on assignment Y 50511 On Monday Feb 26th, 2024. Statements from locomotive engineer on assignment Y 50511-26 Mr. Craig Gesner stating that you did not work that assignment and statement from Transportation supervisor Brett Backman stating that you were not present on the assignment when he was observing the crew. Yet, You did put in a time slip claiming the pay for that day. Why was a time slip put in claiming pay if you did not work that day?
> A. I can not remember.

38. I find the testimony of the grievor deeply troubling. He admits that the entry for his time is not accurate. However, on March 18 he had a clear recollection of what took place on January 4, and recalled having had an interaction with the crew office concerning his attempt to book off to do his prerequisite for online training and being unable to do so in the system. He then testified that he told TM Soliman of this and noted that he had claimed it as an SLE training day. The Company then demonstrated that he had **done no online**

training on January 4th, to which the grievor had no explanation. His testimony with respect to February 26 was not contradictory, but rather that he had no recollection of why he would have claimed the time not worked.

39. In 2022, the grievor had previously admitted having falsified claims:

> 10.Q. Please describe in your own words, the circumstances leading up to the incident.
> A. Overwhelm by bills, held out of service, unable to work, still was not able to sleep properly. I was uncertain and scared because I just found that, my family will be getting bigger. I thought that was only 3-4, not that many. I did the claims to help me and try to relieve the stress before going in a depressive state.

40. There is an issue concerning whether the grievor had previously been disciplined for these actions as the Form 104 provided in the present matter does not indicate previous discipline being imposed. The Company claims that it is merely a systems error, while the Union claims that no discipline was ever imposed.

41. In my view, whether the grievor was disciplined with a 3-day suspension or not is less important than the admission by the grievor that he had previously falsified a time claim.

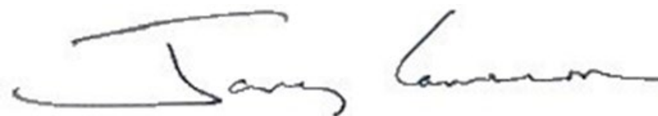
42. The Company clearly has the burden of proof to demonstrate that the grievor not only claimed and was paid for work not done, but did so intentionally. I find that the Company has met this burden of proof.

43. The initial explanation for the January 4 claim were detailed and involved his conversations with two different actors, being the crew office and Train Master Soliman. When it was demonstrated that these explanations could not have been true, the grievor had no explanation. While he had no justification for the February 26 claim, he did not attempt to an explanation.

44. The grievor does not have lengthy service, at some six years. In this relatively brief service, he accumulated 50 demerits and two written reprimands. He has admitted previously falsifying time claims. His explanations here, particularly for the January 4 claim, lack credibility. The Company claims that in the circumstances, it can no longer have confidence in the grievor and that his termination must be upheld.

45. Unfortunately, I cannot find that the action of the Company was unreasonable, and therefore the grievance must be dismissed.

46. I retain jurisdiction with respect to any issues of interpretation or application of this Award.



December 4, 2024

JAMES CAMERON
ARBITRATOR