CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5148

Heard in Montreal, February 13, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 demerits & dismissal assessed to Conductor D. Vicente ("the Grievor") of Kamloops, BC.

JOINT STATEMENT OF ISSUE:

Following a formal investigation Mr. Vicente was assessed 30 demerits and subsequently dismissed for an accumulation of demerits on December 14, 2023, for the following: *"For booking off sick on two or more available days in a calendar month, contributing to excessive and/or patterned absenteeism. A violation of the CPKC T&E Availability Standard Canada."*

Please be advised that you have been DISMISSED from Company Service for the following reason(s):

Please be advised that in light of your December 14, 2023 assessment of discipline, you are hereby DISMISSED from Company Service for an accumulation of Demerits under the Hybrid Discipline & Accountability Guidelines."

Union Position

The Union contends the Company's failure to properly respond to the Step One appeal is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

Within the Company's Step 2 response the Company expands its position by making reference to four book offs that Mr. Vicente was not disciplined for on his Form 104. The Company also now includes Canada Labour Code personal leave time, vacation time, and regulatory rest as justification for discipline. The Union and the Grievor are prejudiced by this expansion of grounds for discipline.

The Company states in their Step 2 response that even if the 30 demerits were removed, Mr. Vicente would still be dismissed as he would remain at 65 Demerits. The Union cannot agree. If this assessment of discipline was removed, the 30 deferred demerits would not be activated, and Mr. Vicente must be reinstated. The Company cannot arbitrarily dismiss someone without reason.

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 *void ab initio*.

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 any absences in question were not bona fide. Mr. Vicente provided a medical note. The Company referenced prior book offs for which Mr. Vicente had already received discipline in the determination of this assessment of discipline.

The Union contends the discipline assessed is arbitrary, unwarranted, unjustified, and excessive in all the circumstances. The Union contends that the discipline is in violation of Article 35 of the Collective Agreement, Duty and Rest Period Rules, CP Rail's Fatigue Management Plan and Policies HS 4552 & 5830, and the Canada Labour Code. 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 disputes the application of the T&E Availability Standards Canada and Hybrid Discipline & Accountability policies in the instant matter.

The Union seeks an order that the Company has violated the above-cited Collective Agreement articles, policies, and legislation. The Union requests that the discipline be removed in its entirety, and that Mr. Vicente be reinstated with full seniority and benefits and is made whole for all associated loss with interest including damages to be determined. 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 Union suggests the Company has effectively failed to respond to the local grievance within the mandatory time limits and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the local grievance response, the Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure.

The Company disagrees with the allegation that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union.

The Union has failed to provide any compelling evidence to support their allegation of a violation of DRPR, FMP, HS5442 & 5830. The Company maintains there has been no such violation.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

For the Union:	**For the Company:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chairperson CTY-W	Director Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary

And on behalf of the Union:

E. Carr	– Counsel, Caley Wray, Toronto
J. Hnatiuk	– Vice General Chairperson, CTY-W, Mission
D. Fulton	– General Chairperson, CTY-W, Calgary

AWARD OF THE ARBITRATOR

Context

1. The Grievor is a 4.5-year Conductor. At the time of this incident, the Grievor had a record of formal discipline of 35 demerits, including the demerits which were the subject of **CROA 5148**, a 15 day and a 5-day suspension, plus 5 days deferred, plus an additional 30 demerits deferred from an incident in June 2023.

Issues

A. Did the Company fail to respond to the local grievance, and if so, what are the consequences?

B. Was the investigation conducted in a fair and impartial manner?

C. Has the Company established culpability?

D. If so, was the discipline assessed reasonable in the circumstances, or should an alternative penalty be imposed?

E. Should the Grievor be dismissed for accumulation of demerits?

A. Did the Company fail to respond to the local grievance, and if so, what are the consequences?

Position of Parties

2. The Union argues that it did not receive the Step 1 Reply found at Tab 4 of the Company documents. It states that it only received a “Grievance denied” answer.

3. The Company argues that it did respond, but that in any event, article 40.4 of the Collective Agreement provides: “Where a decision or an appeal against discipline imposed is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may be progressed to the next step of the grievance procedure”.

Analysis and Decision

4. The Step 2 grievance is dated May 8, prior to the May 14 Step 1 Reply from the Company.

5. The Union clearly did act in accordance with article 40.4 of the Collective Agreement, and progressed the grievance to the next step. The grievance was able to proceed.

6. However, I note that late filings or minimal responses to grievances are not helpful in attempting to resolve issues at the lowest level, in keeping with good Labour Relations and the Parties agreement. The Parties are encouraged to respond in depth to grievances in a timely manner.

B. Was the investigation conducted in a fair and impartial manner?

Position of Parties

7. The Union argues that the Notice to Appear was vague, not identifying the dates to be questioned. It also argues that the investigation itself was unduly delayed, being held in December concerning events from the previous January, resulting in prejudice to the Grievor. It argues that this has made the investigation unfair and partial, and hence the discipline must be held to be void ab initio, (see **CROA 3061**).

8. The Company argues that all investigations are intended to be “with prejudice” and that the investigation was fair and impartial.

Analysis and Decision

9. I agree with the Company that answers given in investigations are to be truthful, and that false or misleading information can be the subject of discipline. Therefore, answers are being given “with prejudice”. Both Parties rely on the information provided during the investigation.

10. The Notice to Appear (see Tab 7, Company documents) notes that the investigation would concern: "you allegedly not obliging with the T and E Availability Standards Canada Bulletin BCI-INT-013/19 in the form of booking off sick on two or more available work days in a calendar month" (underlining added).

11. The only period on which the Grievor was questioned concerning two or more sick days was with respect to October 28, 2023, where he was off sick for a period of 41 hours (see Q and A 20-23). The Grievor clearly had a good recollection of this sick day period and responded with clarity and detail for why he booked off sick. At the time of the investigation on November 30, this event was only marginally more than one month ago. Questioning on booking off sick does not appear to be either unfair or partial.

12. Much of the questioning concerned booking unfit, rather than booking sick. No objection was made by the Union to these questions on that basis, other than "the subject matter of his investigation is vague and excessively broad".

13. The Grievor nonetheless had a clear recollection about why he booked unfit on October 27 and November 11. He did not, however, remember details concerning October 10:

> "Q16. What was the reason for booking unfit on Tuesday October 10?
>
> A16 I don't remember the specifics, but I must have been unfit."

14. If the Grievor is not provided with a more specific Notice to Appear dealing with specific days on which he booked unfit, it will to be expected that recollection will be less than perfect. As it is, the Grievor has provided his answer, and the Company will have to live with the response. The response is in keeping with his more detailed responses to October 27 and November 11.
15. I do not find that the Notice to Appear or the Investigation itself to have resulted in a process which is unfair or partial. The situation would have been different if the

facts had been different. In **CROA 1588,** Arbitrator Picher found that the Grievor was unable to formulate a defense, given the passage of time and a situation arising from a "moment in time" "without any particular significance to him". Here, the act of booking unfit or sick would have far greater significance than a particular speed over a particular stretch of track. Here, unlike in **CROA 1588**, the Grievor has not been prevented from mounting a defense.

16. Accordingly, I find that the objection that the investigation was not fair or impartial cannot be sustained.

C. Has the Company established culpability?

Position of the Parties

17. The Company argues that the Grievor admits that he booked off sick for more than two days, and booked off unfit on three occasions over the period of approximately one month. Culpability has therefore been established.

18. The Union argues that on the basis of both procedure and substance, the Company has failed to establish culpability. It argues that the Form 104 only mentions booking off sick and that the Company is limited to that ground. Substantively, it argues that the fact of an absence is insufficient to establish culpability. The Company has to explore <u>why</u> the Grievor was absent and establish that there are grounds for discipline.

Analysis and Decision

19. The Grievor was given a Form 104 for 30 Demerits "For booking off sick on two or more available days in a calendar month, contributing to excessive and/or patterned absenteeism. A violation of the CPKC T and E Availability Standard Canada" (see Tab 1, Company documents).

20. The T and E Availability Standard reads as follows:

<u>T&E Availability Standard</u>

For Canadian Pacific to be successful and competitive in the North American Railway industry we not only have to provide great customer service, we have to continue our collective efforts at exceling on efficiency and productivity. Given that efficiency and productivity are directly impacted by employee attendance levels, an attendance policy that is understood and adhered to by all is essential.

Effective February 1, 2017, the following availability standard supersedes and replaces all previous availability standards for T&E employees In Operations at Canadian Pacific.

T&E employees have negotiated opportunities provided for in their Collective Agreements to legitimately remove themselves from the working board. Examples of negotiated and also legal absence categories that will not result in discipline under this availability standard include: annual vacation; pre-authorized personal leave; bereavement; jury duty; company business; and time *off* mandated by the hours-of-service regulations.

T&E employees who book off sick on two or more available work days in the calendar month will be subject to attendance review. Disciplinary action may result.

The following absence categories will be handled as more serious offenses separate from this calendar month review:

- Miss calls (including missing calls as an ESB);
- Booking sick or unfit on-call or after accepting a call;
- Booking sick or unfit after call time or after start time of assignment;
- Refusals to protect service;
- Not reporting or reporting late for duty;
- Unauthorized absence (AWOL);
- Exhibiting a pattern of booking sick on weekends or consecutive to other absence types, such as, but not limited to: vacation, paid leave, Earned days off and rest days.

Note: Medical documentation will not be accepted to excuse these absence categories except in extraordinary circumstances involving a documented medical emergency.

Employees requesting to have sick absences excused due to serious medical issues must ensure that satisfactory medical information is received by Occupational Health Services for review within three (3) business days from the last day of the medical absence. The three-business day requirement will be strictly enforced. Upon receipt of timely and satisfactory information, Health Services will review the request and advise CMC whether the absence has been medically substantiated.

21. It does not appear contested that efficiency and productivity are impacted by employee attendance levels.

22. It is also clear that the T and E Availability Standard calls for “attendance reviews” and notes that “Disciplinary action may result”. Thus, not all sicknesses or all unfit bookings will result in discipline. A review must take place to determine if discipline is appropriate.

23. The Standard calls for a review in the case of sickness for “employees who book off sick on two or more available work days in the calendar month” or a daily review in the case of unfit on-call or after call.

24. The Standard also notes certain absence categories will be treated as more serious offences, including “exhibiting a pattern of booking sick on weekends or consecutive to other absence types…”. Interestingly, there is no mention of a pattern of declarations of being unfit.

25. In this case, the discipline was given based on two factors: 1) For booking off sick on two or more available days in a calendar month; and 2) contributing to excessive and/or patterned absenteeism. The Company therefore bears the burden of proof to establish culpability for these two factors. For the reasons that follow, I find that culpability has not been established.

26. With respect to the issue of booking off sick on October 28, 2023, there is no evidence to contradict the Grievor’s explanation that he was sick during the period in question. In his investigation, he clearly identified why he had booked sick:

> Q20. According to the evidence provided in Appendix C, you were booked back on at 0800 on Saturday October 28th, and on that same day you booked sick at 2037, 12 hours and 3 minutes later, is that correct?
> A20. According to the evidence.
> Q21. According to Appendix A, when you booked sick on Saturday October 28th 2023, you were off for a total of 41 hours, is that correct?
> A21. According to the evidence.
> Q22. Was booking off on Saturday October 28th for a valid medical reason?

> A22. Yes, I had a respiratory cold, major headache and trouble breathing. I was not well enough to go to work did didn't want to get other employees possibly sick.
> Q23. Did you reach out to a company officer when you booked unfit, then subsequently sick?
> A23. No.
> […]
> Q33. Do you have anything you wish to add to the statement?
> A33. I only book off when I am unable to go to work. I was sick or unfit on the days above, I usually take auto book on for unfit book offs. I booked sick for a valid reason and obtained a doctor's note. I was not able to go to work and be fit for duty and did not want to get anyone else sick.

27. The Grievor also provided a medical note covering this period (see Tab 14, Union documents).

28. The Company has provided no evidence to establish that the Grievor was not sick during this period, nor were his answers put into doubt during the investigation. I find that the Grievor has established that he was in fact sick.

29. As such, the Canada Labour Code, the Collective Agreement and arbitral jurisprudence all confirm that the Grievor may not be subject to discipline:

> 9. Part III of the *Canada Labour Code*, section 239 (1) states:
> Subject to subsection (1.1), no employer shall dismiss, suspend lay off, demote or discipline an employee because of an absence due to illness or injury.
> 10. The Union notes that the Collective Agreement, in multiple articles, recognizes the right of running trades employees to be the judge of their own fitness to work, and that employees will not be disciplined for booking unfit. Article 35 of the Consolidated Collective Agreement is titled "Booking Unfit" and states:
>
> ARTICLE 35 - BOOKING UNFIT
> 35.01 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."
>
> […]
> 13. Arbitrators, including CROA arbitrators, consistently find that employees cannot be disciplined or punished simply for being unfit to work. For example, in *Case No. 3863* (Tab 5), Arbitrator Picher stated, "To put it simply, employees cannot be disciplined or punished for being ill or physically unfit to work."

30. I cannot agree with the Union argument that the Company is not allowed to consider the issue of booking unfit. The Form 104 mentions that booking sick "contribut(ed) to excessive or patterned absenteeism. However, for the reasons that follow, I do not find that the Company has established that there is in fact "excessive or patterned" absenteeism.

31. The Company points to the admission by the Grievor that he had booked unfit on October 10, October 27 and November 11, 2023.

32. The Company has not argued, let alone established, that there was a "pattern" of absenteeism. One is certainly not evident from the facts of the case.

33. The Company has established the fact of booking unfit three times in a roughly one-month period. However, the booking unfit was done prior to being called, so the matter is distinguishable from the facts in **CROA 5147**. The Company has not established that the Grievor was untruthful in declaring himself unfit. There is no question of being in Jamaica on vacation, as was the case in **AH 751**. Rather the Grievor testifies, and his testimony is uncontradicted, that he was unfit, and accordingly booked off.

34. The Union notes that the Grievor's absences from January-December 2023 amounted to some 1.18 days/month. There is no evidence from the Company that such a rate is beyond the average, as compared to his peers.

35. It is clear that the Company bears to onus to establish culpability. The fact of an absence does not do this. It merely sets up the possibility of an investigation to determine whether the absence was justified or not (see **CROA 4340**, **CROA 4524**, **AH 751**, and **CROA 4757**).

36. Accordingly, I cannot find that the Company has established culpability on the part of the Grievor for the identified absences.

D. If so, was the discipline assessed reasonable in the circumstances, or should an alternative penalty be imposed?

37. As no culpability has been established, either for booking sick, or for booking unfit, there is no just cause for discipline.

38. The grievance is therefore allowed and the 30 Demerits are struck from the record of the Grievor.

E. Should the Grievor be dismissed for accumulation of demerits?

39. The Grievor was dismissed based on the following Form 104:

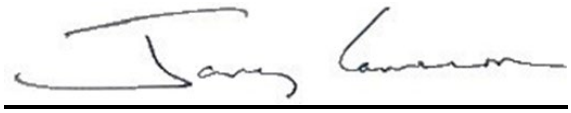
> "Please be advised that in light of your December 14, 2023 assessment of discipline, you are hereby Dismissed from Company service for an accumulation of Demerits under the Hybrid Discipline and Accountability Guidelines" (see Tab 2, Company documents).

40. As the discipline of 30 Demerits has now been struck, the Grievor no longer has the 60 demerits which may warrant dismissal under the Hybrid Discipline and Accountability Guidelines.

41. Accordingly, the Grievor is reinstated and to be made whole, subject to mitigation.

42. I remain seized for any questions of interpretation or application of this Award.

March 19, 2025



JAMES CAMERON
ARBITRATOR