

IN THE MATTER OF ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

AH: 774

DISPUTE:

Appeal of the dismissal of Conductor Jeff Reid of Winnipeg, MB.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Reid was dismissed which was described as:

“for your Conduct Unbecoming on March 25th 2020 and failing to abide by CP company policies surrounding COVID-19 procedures to be followed outlined in the bulletins below:

CP System Bulletin CPSB-011-20

CP System Bulletin CPSB-020-20

For the above reasons mentioned and Violation of CP’s Policies warrants your immediate dismissal.”

UNION POSITION

The Union submits that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement:

- the Company entered hearsay evidence,
- the investigating officer engaged in badgering behaviour toward Mr. Reid,
- the Company failed to disclose all evidence with the Notice of Investigation, and the investigating officer entered several pieces of evidence throughout the investigation in violation of Article 39,
- Mr. Reid’s private and confidential medical information was entered as evidence into the investigation, despite Mr. Reid clearly stating he did not provide consent to the release of the information.

As a result, the Union contends that the discipline ought to be removed in its entirety and Mr. Reid be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment. In the alternative, the Union contends that Mr. Reid’s dismissal is unjustified, and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union requests that Mr. Reid be reinstated without loss of seniority and benefits, that the discipline be removed in its entirety, and that Mr. Reid be made whole for all lost earnings 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 Grievor's culpability was established following the fair and impartial investigation into this matter and discipline was properly assessed. Discipline was assessed in line with the Company's Hybrid Discipline and Accountability Guidelines.

As established in the fair and impartial investigation statement, the Grievor read and understood the bulletins explaining CP's policy and expectations on COVID-19 yet reported to work after posting on social media that he was showing symptoms of COVID-19. The Grievor was non-forthcoming and provided contradictory answers during his investigation which required several summarizing questions to clarify the information he was providing. The Grievor put fellow employees at risk by reporting for duty while he was sick, causing them significant distress while they were put in self-isolation awaiting their COVID-19 test results.

Discipline was determined following a review of all pertinent factors, including those that Union describe as mitigating. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:



Dave Fulton
General Chairperson

FOR THE COMPANY:



Lauren McGinley
Assistant Director, Labour Relations

March 1, 2022

Hearing: March 30, 2022 - By videoconference

FOR THE UNION:

Ken Stuebing, Caley Wray
Dave Fulton – GC, CTY West
Doug Edward – Sr. VGC, CTY West
Ryan Finsson – VGC, CTY West
Virgil Seidler – Local Chairman CTY, Winnipeg
Jeff Reid – Grievor

FOR THE COMPANY:

Lauren McGinley, Assistant Director Labour Relations
Ivette Suarez, Labour Relations Officer

JURISDICTION

[1] The parties agree I have jurisdiction to hear and resolve this dispute with all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*. This is an Ad Hoc Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument.

BACKGROUND

[2] The initial facts giving rise to this dispute begin on March 24, 2020, when the Grievor was working on train 411-24 with a Conductor and Engineer from Winnipeg to Brandon, MB. Given the COVID-19 pandemic, the Conductor was concerned that Mr. Reid was coughing at the start of their shift. He questioned Mr. Reid about the cough. The next day, after his return trip to Winnipeg, the Conductor found a Facebook post made by Mr. Reid, in which the Grievor stated that he was being tested for COVID-19. The Conductor contacted the Grievor and provided him with the phone number for CP Rail's Pandemic Line.

[3] Concerned that he and others may have come into contact with someone who had COVID-19, the Conductor also contacted the CP Rail Superintendent to report the matter. He stated during the investigation process that he did so to validate his own personal concerns and for his well-being and his family's well-being. He provided the Company Officer with a screenshot of the Facebook post and an earlier post, dated March 20, 2020. Mr. Reid had stated he was showing every symptom for the "Chinese virus".

[4] On March 25, 2020, the Grievor called Manitoba Health Link and made arrangements to get tested for COVID-19. He again posted on social media stating:

Went and got tested and the nurse told me my eyes might water when she ticks the Q-tip up my nose, I told her don't worry I've stuck lots of things up my nose. Then she was like oh you have tell me more, then I said sorry sweetie I don't party like that anymore lmfao.

[5] CP expressed considerable concern for the Grievor's social media posts and noted that the reference lmfao stands for "laugh my f----- ass off".

[6] On March 25, 2020, the Grievor also contacted CP Rail's Pandemic line. He reported that he had symptoms including "shortness of breath, headache, cough, fever, runny nose". Mr. Reid also disclosed that he had called Manitoba Health Link on Friday March 20, 2020 and had been waiting since for a COVID test.

[7] Mr. Reid was tested for COVID-19 on March 25, 2020 and was still waiting for results. CP Rail's Pandemic Team instructed the Grievor to self-isolate. The Company investigated who else may have come into contact with Mr. Reid recently, and they submit that four other Train and Engine Employees and a Crew Transportation driver were required to self-isolate as a result.

[8] The Company maintains that the Grievor was dismissed after a fair and impartial investigation. The investigation established that the Grievor reported to work while showing signs and symptoms of COVID-19, failed to self-isolate and failed to contact the CP Pandemic Line before reporting for duty on March 24, 2020, placing numerous employees at risk.

[9] The Grievor was dismissed by letter dated April 24, 2020 advising him:

Please be advised that you have been dismissed from Company Service effective April 24th 2020 for your Conduct Unbecoming on March 25th 2020 and failing to abide by CP company policies surrounding COVID-19 procedures to be followed outlined in the bulletins below:

CP System Bulletin CPSB-011-20

CP System Bulletin CPSB-020-20

[10] The Union maintains that CP Rail terminated Mr. Reid's employment outright, and bears the onus that there is cogent evidence of conduct unbecoming on March 25, 2020 that justifies this most extreme and abusive action. The Union sees no justification for discipline in these circumstances. It submits that there is no evidence of conduct unbecoming in the above actions.

[11] The Company relies on *William Scott & Co. v. C.F.A.W., Local P-162* (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B); *Johnston Controls Canada LP and Teamsters Local Union 419*; *Teneco Canada Inc. and United Steelworkers, Local 2894*; *LIUNA Local 183 v. Aecon Industrial*; *SHP 595*; *McKinley v BC Tel*, 2001 SCC 38, [2001] 2 SCR 161; *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009 CanLII 31586 (ON LRB). The Union relies on *KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson); *CROA Cases 1561*; 3322; 4492; 4622.

[12] I have carefully reviewed the parties written submissions and case law. In keeping with the parties' process agreement, I will only specifically refer to the case law to the extent necessary for purposes of the determination required in this matter.

ANALYSIS AND DECISION

[13] The Grievor, Jeffrey Reid, is 33 years old. He commenced his employment with Canadian Pacific Railway on April 6, 2015. The Union submits that there are a number of issues that are also significant in this case. The Grievor is a smoker. The Union submits that he started smoking at age fifteen and smokes approximately one pack of cigarettes a day. Mr. Reid lives with and provides care for his elderly father. He has done so since the beginning of 2020.

[14] An investigation was conducted by the Company, and a statement was taken from the Grievor on April 10, 2020. The Union maintains that the investigation was not conducted in a fair and impartial manner for the reasons set out in the Joint Statement of Issue.

[15] The Union argues that the Company policies and supporting bulletins issued to employees do not meet the *KVP* supra test. There is an obligation on the Company to provide a clear understanding of the precise nature of the policies the Grievor is alleged to have violated in order to have a meaningful opportunity to prepare and respond to the investigating officer's questions and offer rebuttal if appropriate.

[16] The Grievor works in a safety critical position. I take notice of the state of awareness of the world to COVID-19 at the time of the incident. The Grievor was referencing the "Chinese virus" in social media saying he had all the symptoms. The Grievor maintains that his comments on social media were a joke. His co-worker brought his concerns for his coughing to his attention and raised it with management.

[17] The Union argues that the CP System Bulletin CPS8-011-20 does not make it mandatory to isolate if an employee has any symptoms. It says an employee must isolate only if the employee thinks they may be infected or exposed. The Unions argues that Mr. Reid obviously did not think he was exposed and the Bulletin fails to describe the symptoms of COVID-19.

[18] I have reviewed the Company COVID Bulletins issued at the outset of the pandemic and find them clear as well as consistent in emphasising the seriousness of the situation for employees to protect fellow workers with attention to their own conditions.

[19] The Union argues that the Grievor did not receive a fair and impartial investigation. A fair and impartial investigation is generally regarded by arbitrators as the foundation for the assessment of a potential discipline. It requires fair questioning by the investigating officer and truthful responses by the employee.

[20] In this case, the Conductor working with the Grievor stated that while pulling paperwork at the start of their tour of duty, he asked how Jeff was feeling, after he heard him cough. The Grievor shrugged it off and said he was getting over a cough and was a smoker. The Superintendent confirmed the Conductor's statement. At the investigation, the Grievor maintained that he had never said he was getting over a cough. He maintained that he just said he was a smoker and it never occurred to him that a smoker's cough could result in loss of work for fellow employees

[21] I find the Grievor's insistence that he never said he was getting over a cough is inconsistent with the Grievor's repeated posts on social media and his response to CBC reporters as he left the testing facility. The Grievor was well aware of the pandemic. He referenced President Trump's "Chinese virus" statements. The Union's written submissions clearly set out the initial facts stating:

Conductor Page was concerned that Mr. Reid was coughing at the start of their shift. Mr. Page questioned Mr. Reid about the cough, and Mr. Reid explained that he was a smoker and **just getting over a cough.**

Emphasis Added

[22] In addition, on March 25, 2020, the Grievor also contacted CP Rail's Pandemic line. He reported that he had symptoms including "shortness of breath, headache, cough, fever, runny nose". Mr. Reid also disclosed that he had called Manitoba Health Link on Friday March 20, 2020 and had been waiting since for a COVID test.

[23] The Union argues that despite his report of symptoms to CP's COVID Pandemic Team, Mr. Reid maintains that he in fact did not have symptoms, that he only reported symptoms in order to get a test. He felt this was necessary because he was living with his father who had pneumonia at the time. The COVID test was to put his father at ease. This statement is alarming given that he did not have concern for his fellow workers and their families when he dismissed the concerns of the Conductor.

[24] CP submitted that on March 28, 2020, the CP Disability Management team also made contact with the Grievor. The Disability Management Case Notes indicated that the Grievor said had come down with a cold the previous Friday. His dad had pneumonia and wanted to be sure his son did not have COVID. The Grievor indicated he went to work because he needed the money.

[25] The Grievor was ultimately tested for COVID on March 25, 2020 and tested negative. During the investigation, he also acknowledged that as he was leaving the testing facility, the Grievor was approached by a CBC reporter and featured in an article called "Winnipeggers tested for COVID-19 seek peace of mind for themselves, loved ones" which was published the following day. The article stated:

Jeff Reid hops out of the Mount Carmel Clinic, a North End health centre doubling as a COVID-19 testing clinic, wearing a protective mask over his face. He slips it off as he approaches his vehicle.

Reid is a train conductor by profession, and was told by his employer to report for testing. A week and a half earlier, he travelled to the United States for work. He became short of breath, he coughed, but Reid feels better now. He doesn't think he has COVID-19.

"Yeah, I guess," he says, when asked if he'll isolate himself from family and friends.

Railway workers aren't required to self-isolate, but are asked to do so if they develop mild symptoms.

"They say that, but I'm an essential employee."

[26] At the investigation, the Grievor acknowledged his conversation with CBC but could not recall if he made the comments indicated in the article.

[27] The Union submits that Mr. Reid's COVID test returned negative. The Union emphasises that at no time did Mr. Reid think he had contracted COVID-19 nor did he think he had been exposed. It says the Grievor was living with his father who was at risk due to having pneumonia.

[28] The Company held a formal investigation on April 7, 2020 requiring a statement from the Conductor. On April 10, 2020, the Grievor was cleared to return to work. Before allowing him to return to work, the Company scheduled an investigation on April 10 in connection with his failure to report his COVID symptoms. The Grievor's investigation began at approximately 9AM and concluded at 8:30 PM. The Union submits that there is no legitimate reason for the statement to have been over 100 questions long.

[29] I have reviewed the investigation and over twenty objections made by the Union representative. Given the realities of the pandemic at the time, the Union objections and the Grievor's answers were alarming. The Grievor's answers at the investigation were often vague or stating that he did not remember. He contradicted statements of the Conductor and his own public statements. The Company gave the Grievor the opportunity to reconsider his statements and he did not. The Grievor claimed his public statements were largely meant as a joke.

[30] The Union relies on CROA 1561 claiming the investigating officer was not impartial. Unlike CROA 1561, this is not a case of claims and counter claims where the investigating officer shows favour to one person's statements. This is a case where the statements in question are all primarily those made by the Grievor.

[31] The Union also relies on the comments of Arbitrator A. Sims in CROA Cases 4492 and 4462 regarding "piling on". I do not find this a case of piling on or overreaching by the Company. This is a case of investigating one legitimate workplace safety concern and establishing the facts.

[32] Given the Grievor's actions and public comments, I find the investigation an appropriate response. The Union's objections to the Company providing evidence that the Grievor himself had for the most part made public. The evidence was necessary and probative to the issues in dispute. It facilitated the search for the truth at a critical point in the pandemic. He had also provided the same information directly to CP Rail's Pandemic intake team. I find the information was relevant and not a violation of his privacy in the circumstances.

[33] I find the Grievor's actions had resulted in a number of employees being forced to isolate. As the Conductor reporting the incident noted the affected employees also had families and others they may have come in contacted.

[34] The Grievor works in a safety critical environment. It requires that he fully comply with his duties accurately and honestly. It comes with the awareness of the need for responsibility and trust. Persons occupying a position of trust are especially at risk when they violate that trust.

[35] The Grievor justified his actions as resulting from concern for his father having pneumonia for which he provided no evidence of him having. He minimized the legitimate concerns for co-workers. I find he repeated his misconduct multiple times over several days. He tried to minimize and justify his actions and comments as a joke. He repeatedly provided misleading information to minimize his actions. I find the Grievor's version of events not credible or reliable.

[36] The Grievor is not a long service employee. He has a discipline record with two previous suspensions. His failure to be accountable for his actions are inconsistent with his returning to a safety critical position.

[37] The Grievance is dismissed.

Dated this 6th, day of June, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges", is enclosed in a thin black rectangular border.

Tom Hodges

Arbitrator