

IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

JOINT STATEMENT OF ISSUE

DISPUTE:

Appeal of the 20-demerits assessed to Conductor Neil Lashley.

Following an investigation Mr. Lashley was assessed discipline as noted in his Form 104 as follows:

Formal investigation was conducted on April 9, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated T&E Availability Standard operating bulletin No-SI-064-18. In consideration of the decision above, you are hereby assessed 20 demerits.

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION'S POSITION:

The Union contends that any discipline assessed in this matter is in violation of the Canada Labour Code 239, 125, CROA 1588, Employment Equity, Policies 1300/1500 and Article 39.05 of the Consolidated Collective Agreement where a fair and impartial process did not take place based on the statement being flawed account an unreasonable amount of time was taken to hold the statement as well as no pattern was established.

The Company questioned the sick time which was outside of reasonableness and arbitrated jurisprudence of the length of time post issue to statement. The Union contends that this discipline is unwarranted and unjust as the investigation was flawed due to the length of time from sick days to the statement.

Mr. Lashley was sick. He was not asked to provide medical notes as per the process of the Canada Labour Code Section 239 and he was not unavailable for the time period as prescribed by the same Section of the Code. Mr. Lashley complied with CROR General Rule A and 2.1 (a).

The Company's Attendance Policy is not contained within the Collective Agreement. No pattern was established.

The Union requests that the discipline assessed (20-demerits) be removed. In the alternative, the Union requests that the discipline be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION:

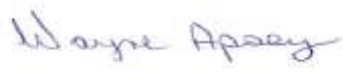
The Company disagrees with the Union's contentions and denies the Union's request. The Company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

The Grievor booked sick eight occasions within a short period, a cause for concern and investigation by the Company. He was found culpable for violations of the T&E Availability Standard for his January 24 and 25 and February 2 and 3 absences. As such the Union's references to CROA 1588 and CLC 239, 125, Employment Equity, Policies 1300/1500 are of no merit or value. The discipline was appropriate and warranted in its entirety and the Company cannot see a reason to disturb the discipline assessed.

The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:



Wayne Apsey
General Chairperson CTY TCRC

FOR THE COMPANY:



Lauren McGinley
Assistant Director Labour Relations

March 28, 2023

Hearing: By video conference. April 12, 2023

APPEARING FOR THE UNION:

Ken Stuebing, Counsel, Caley Wray
Wayne Apsey, General Chairperson, CP Rail East
Neil Lashley, Grievor

APPEARING FOR THE COMPANY:

Rene Araya, Coordinator Labour Relations
Francine Billings, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited 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. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] The Grievor, is 50 years of age. He entered Company service on April 6, 2015 and works as a Conductor based out of Smith Falls, ON. During the time of his alleged attendance violations in January and February 2019, the Grievor worked out of Toronto Yard on a regular yard assignment. At time of issuance of discipline, the Grievor had approximately four (4) years of service.

[3] The Grievor booked sick on January 24 and 25, February 2, 3, 19, 24, 25, and 26. The Grievor was given a Notice of Investigation on April 5, 2019. An investigation was held as scheduled with the Grievor and his union representative, Tom Stephens on April 9, 2019.

ANALYSIS AND DECISION

[4] The Company maintains that the Grievor was culpable for absenteeism on the days outlined in the 104. The Company argues that the Grievor exhibited a pattern of booking sick on weekends or consecutive with previously assigned days off. He did this in contrast to other absence types, such as, vacation, paid leave, earned days off and rest days. It says that having eight missed days of work within a short period of time and given the Grievor's less than exemplary discipline record, the Company was well within their rights to investigate his pattern absenteeism.

[5] The Company submits that the Grievor understood the T&E Availability Standards and understands that he has an obligation to attend work. The railway is a 24/7 operation and as an operations employee, the Grievor has a responsibility and contractual obligation to be available and report for duty when not on personal rest, days off or leave.

[6] The Grievor was found to be in violation of the T&E Availability Standards and was appropriately assessed 20 demerits for his attendance issues on January 24, 25 and February 2, 3, of 2019.

[7] The Company set out the order of days the Grievor booked sick in conjunction with days off and annual vacation over the course of 40 days, only working a total of 13 times.

January 2019						
20 off	21 off	22 off	23 off	24 sick	25 sick	26 work
27 work	28 work	29 off	30 off	31 work		

February						
					1 work	2 sick
3 sick	4 AV	5 AV	6 AV	7 AV	8 AV	9 AV
10 AV	11 off	12 off	13 work	14 work	15 work	16 work
17 work	18 work	19 sick	20 off	21 work	22 off	23 work
24 sick	25 sick	26 sick	27 off	28 off		

[8] The Company maintains that this is not a case of booking unfit. It is about booking off under the sick provision on multiple occasions consecutive to days off and vacation where there was not documentation to support his absences. The Grievor acknowledged that he did not seek medical attention for Jan 24 & 25 or Feb 2 & 3, which were consecutive to his days off. It says the Grievor violated the T&E Availability Standard.

[9] The Union submits that in general, though not without blemish, Mr. Lashley's record reflects periods of discipline free service. The bulk of all assessments of discipline on file are for relatively minor operational infractions consisting of informal, record suspensions. As of March 2019, he had not received any discipline for over three years. Most notably, the Grievor did not have any formal discipline for absenteeism issues.

[10] The Union argues that the Company simply cannot discharge its burden of proof that the discipline was legitimate. He was simply disciplined for the exercise of his right to book sick due to bona fide illness. The Company disciplined Conductor Lashley without a finding of culpability is contrary to the Canada Labour Code. The Grievor did not book sick for other than a bona-fide illness. The Union maintains that Part III of the Canada Labour Code, section 239 (1) applies providing:

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.

[11] The TCRC maintains that an employee can be sick anytime on any day. An employee can be sick and even hospitalized while off on AV. Absent evidence of prevarication or fraud, booking sick cannot attract discipline. It maintains that at the investigation, Mr. Lashley confirmed he was sick on January 24-25. He booked back on January 25. He did not book off on call. At the investigation, Mr. Lashley acknowledged being sick on February 2. He advised that he tried to get a doctor's appointment. At the investigation, Mr. Lashley confirmed he was sick on February 19. At the investigation, Mr. Lashley confirmed he was sick on February 24. He was only able to see his doctor for this recurring condition on March 1, 2019.

[12] At the investigation, Mr. Lashley confirmed he understands impact on his fellow workers' call times but also understands that going to work sick could impact his fellow workers and safe railway operations in general.

[13] Mr. Lashley confirmed he understands his obligations to attend work when not sick, which he does. All of these instances were handled contrary to the minimum protections of the Canada Labour Code, s. 239. The Union submits that the Company is unable to establish cause for discipline in this case. The Grievor's unchallenged evidence is that he was suffering from a bona fide illness and was absent for that reason and as a result cannot be disciplined or punished for being ill or physically unfit to work.

[14] I find that the Grievor was aware of the Company T&E Availability Standards and understood his obligation related to attending work. I find the Grievor's reliability before his days

off and vacation unacceptable based on any reasonable expectation. I do not find the discipline assessed to the Grievor to be a violation of Part III of the Canada Labour Code, section 239 (1).

[15] The Company maintains that the Grievor was culpable for absenteeism on the days outlined in the 104. According to the T&E Availability Standard, states specifically:

Exhibiting a pattern of booking sick on weekends or consecutive days to other absence types, such as, but not limited to: vacation, paid leave, earned days off and rest days.

[16] It maintains that he booked sick on January 24 and 25, February 2, 3, 19, 24, 25, and 26. These dates fall on directly before or after his vacation days and assigned days off. Over the course of 40 days, the Grievor only worked a total of 13 times. The evidence shows that prior to booking off sick on January 24 and 25, the Grievor's last shift was on the morning of January 20^t. In addition, between this time the Grievor booked unfit the evening of January 20, then booked back on just before his scheduled days off which were January 22 and 23. The Grievor was off work for close to a week in this instance. The Company notes that coincidentally, preceding his booking off sick on February 2 and February 3 which was a weekend, the Grievor had vacation starting on February 4. The Grievor booked sick on February 19, which coincided with his days off on February 20 and 21.

[17] The Union relies upon Mr. Picher's reasoning in CROA Case No. 3921 in which he stated:

The Arbitrator has substantial difficulty with the Company's treatment of the grievor's absences. In all cases of her non-attendance at work the grievor claims that she was ill.

[18] Similarly, the Union points me to the comments of Arbitrator Christine Schmidt in CROA 4340 finding:

To summarize, while the Company may have had some reason to doubt the legitimacy of the grievor having reported sick for the days at issue, in this case, for the reasons referenced herein, I am unable to find that the Company has proven that the grievor inappropriately took sick leave.

Accordingly, I accept the submission of counsel for the Union that the grievor was effectively disciplined for being sick in this case, contrary to section 239 (1) of the Canada Labour Code:

239(1) 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.

With no just cause for the assessment of discipline against the grievor, the 10 demerits issued against him are to be stricken from his disciplinary record.

[19] I find that this is not a case of discipline being assessed for booking sick or the Company failing to take prompt action after the Employee booked sick. This is also not a case of a significant suspension being assessed. This is a case in which the Company submits that it has reviewed the Grievor's work history after a reasonable time and found a pattern of absenteeism resulting in the assessment of 20 Demerits. The Company maintains that the Grievor was culpable for absenteeism on the days outlined in the 104. According to the T&E Availability Standard, states specifically:

Exhibiting a pattern of booking sick on weekends or consecutive days to other absence types, such as, but not limited to: vacation, paid leave, earned days off and rest days.

[20] The investigation took place on April 9, 2019 to review his work history from January 24 to February 26, 2019. While the Grievor's Union Representative objected to the delay, I cannot find that the Grievor was prejudiced in that regard. The Grievor was able to factually answer questions put to him during the investigation. The delay by the Company was necessary to establish a pattern.

[21] The Grievor provided a number of different and equivocating answers to specific questions. Significantly, the Grievor first took the position that the Company Policy cannot supersede the Canada Labour Code. He also responded that by working he would have posed a health risk to his co-workers. I find his position problematic in that he booked off sick 4 times in the period under investigation.

[22] The Grievor acknowledged booking sick at 18:52 February 2 and back on February 4 at 02:58, his first day of annual leave. He claimed he did not go to a walk-in clinic because of concern for the quality of care. He chose to secure an appointment with his Doctor on March 1, when he received a prescription for a sinus infection and told he could return to work March 4. He did not seek medical attention for January 24 and 25. On February 19 he claimed he was too sick in bed to do anything.

[23] At no time did the Grievor choose to contact a Company Supervisor regarding his condition, claiming he was not in a mental condition to do so. Again, I find this claim of particular concern given that he booked off and on four times. He says he was in no mental state to talk to a supervisor in a period when he booked sick and then fit for duty on four separate days, adjacent scheduled time off. He claimed he underestimated his illness while under severe pain and discomfort. He acknowledged in retrospect that he did not follow proper procedures. Given the Grievor's answers to questions during the investigation, while maintaining he understands the rules and his attendance obligations, I have concerns that he may repeat this pattern of attendance.

[24] The Company relies on *Wm. Scott* in *Steel Equipment Co. Ltd.* (1964) 14 L.A.C. 356. In determining whether the penalty imposed by the employer was excessive or inappropriate in which Chairman Weiler stated:

In evaluating the discipline of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company in deciding whether to sustain or interfere with the Company's action.

[25] In this case the Union acknowledges the Grievor's existing discipline record and his short length of service. I agree with the Union that an arbitrator should not apply the employer's original disciplinary measure if the parties later agree to reduce it.

[26] I find the evidence established pattern of booking off on days before assigned days off and leave was repeated notwithstanding his claim of understanding expectations set out in the T&E Availability provisions. In response, the Company has not imposed a financial penalty by way of suspension. It has assessed 20 demerits indicating its belief that the Grievor has been proven to warrant significant discipline.

[27] I agree with the foundation for establishing culpability for patterns of absenteeism, stated by Arbitrator Hornung in AH 679 as requiring a pattern of absenteeism from which an inference of culpability could be drawn.

[28] It is widely recognized by arbitrators that absenteeism places a financial and operational cost on employers. It also adds an extra burden on the remaining employees who then have to pick up the work of their absent colleague in this 24 hour a day 365 day a year operation. Absent

a particular collective agreement provision to the contrary, employers have the right to implement attendance policies. The Company established the Train and Engine Availability Standard provision.

[29] At the same time, the Union has negotiated a number of specific provisions unique to the railway operation to allow T&E Employees to assess additional time off beyond regular days off.

[30] Arbitrators have considered the extent to which the Grievor's absenteeism deviates from that of other employees at the workplace. I am satisfied that 13 days out of 40 is sufficiently beyond what the Company might expect of employees without investigative action being taken. In that regard employees are cautioned in the Availability Standard that employees who book of sick two or more workdays in a month may be subject to a discipline review. The Company encourages Employees to contact supervisors if they are to exceed Availability Standard provisions. The Grievor is not unfamiliar with the investigation and discipline process. He knew and understood the T&E Availability Standard requirements. He repeatedly ignored them.

[31] In view of all of the foregoing, the Grievance is dismissed.

Dated at Niagara-on-the-Lake this 17th, day of July 2023

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

Tom Hodges
Arbitrator