

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

CASE NO. 4757

Heard in Montreal with Video Conferencing, July 16, 2020

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appeal of the 15 demerits assessed to Conductor D. Carron.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Carron was assessed 15 demerits as noted in his Form 104 as follows;

“Formal investigation was issued to you in connection with the occurrence outlined below: “In connection with: “Violation of the T&E Availability Standard Operating Bulletin No. SO-067-18, dated October 24, 2018, on the dates of August 19, 30 and 31, 2018. Including your missed call for Train DH03435T on August 6 2018 at 00:49.

Formal investigation was conducted on October 30, 2018 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of the investigation it was determined the investigation record as a whole contains substantial evidence proving you violated T&E availability standard operating bulletin NO. SO-024-18.”

In consideration of the decision stated above, you are hereby assessed 15 Demerits.

As a matter of record, a copy of this document will be placed in your personnel file.”

The Company did not respond to the Union's Step 1 grievance until after the Union submitted its Step 2 grievance, some 14-days after the Union's Step 2 was submitted. The Company at Step 2 responded with a draft resolve which was not agreed to by the Union. The Union provided a TLE until June 30, 2019. No response was received.

Union's Position:

The Union contends any discipline assessed in this matter is inappropriate, excessive and in violation of the *Canada Labour Code* as well as the Collective Agreement where a fair and impartial investigation was not conducted.

The Company uses a bulletin that was issued after Mr. Carron's dates that he is being investigated on and further uses this bulletin to discipline him. This was objected to at the investigation. Any discipline in this matter account investigation and subsequent Form 104 violate Mr. Carron's Collective Rights, it is clear this was not fair and impartial as provided in CCA Article 39.05 (past CTY East 70.04). The Union's arguments contained within the grievance steps clearly show that not only was this not a fair and impartial process, but Mr. Carron has been discriminated against.

For the reasons and facts presented at all levels of this process, the Union requests that the assessment of 15 Demerits be expunged and Mr. Carron be compensated for any wages lost to attend a needless investigation.

The Union further requests that the Company, based on all the facts have discriminated and harassed Mr. Carron, and punitive damages be awarded to him for what has taken place. This is a clear example where the Company has abused its' Managerial rights.

In the alternative, the Union requests that the discipline be mitigated as the Arbitrator sees fit.

The Company has not provided a position.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Carron was assessed 15 demerits as noted in his Form 104 as follows:

"Formal investigation was issued to you in connection with the occurrence outlined below: In connection with: "Violation of the T&E Availability Standard Operating Bulletin No. SO-067-18, dated October 24, 2018, on the dates of August 19, 30 and 31, 2018. Including your missed call for Train DH03435T on August 6, 2018 at 00:49.

Formal investigation was conducted on October 30, 2018 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of the investigation it was determined the investigation record as a whole contains substantial evidence proving you violated T&E availability standard operating bulletin NO. SO-024-18.

In consideration of the decision stated above, you are hereby assessed 15 Demerits.

As a matter of record, a copy of this document will be placed in your personnel file."

Preliminary Objection 1

The Company puts forward a preliminary objection in this matter as the Union has put forward two separate grievances seeking the same remedy for the same issuance of discipline to the grievor. The Union in their filing of grievances 295-958 & 295-957 is seeking damages and complete mitigation of the grievors discipline via two separately filed grievances.

The Union is seeking nothing more than duplicity of action in the case at hand. In essence, the Union is looking for two kicks at the can to arbitrate the same issue.

Preliminary Objection 2

The Company maintains that the Union's allegation regarding the Company's late grievance response has not been properly progressed through the grievance process and as a separate matter, cannot be combined due to CROA rules and regulations.

Company Position

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability for violation of the T&E Availability Standard Operating Bulletin was established through a fair and impartial investigation. The Company has the right and responsibility to maintain its employees in all aspects of their work, including absenteeism. The Company maintains the investigation contained evidence that the Grievor failed to be available to protect work governed by the Collective Agreement on the dates of August 19, 30 and 31 2018, including his missed call on August 6, 2018.

The Company followed all provisions outlined in the collective agreement when conducting the investigation and maintains that the discipline assessed was just, appropriate and warranted in all of the circumstances. Additionally, the discipline assessed was proper and in line with the Collective Agreement, Company Policy and the *Canada Labour Code*.

The Company cannot agree with the Union's alleged violation of Article 39 of the Consolidated Collective Agreement and maintains that the investigation was both fair and impartial.

The Union has provided no evidence to suggest that there were lost wages and failed to clearly identify how the Grievor has been allegedly discriminated or harassed. Likewise, the

Union's request for punitive damages is unsubstantiated as they have failed to provide clear and rational evidence to demonstrate such a claim.

Of note, the Company responded at Step 2 with a draft resolve which the Union declined. Accordingly, the Company maintains there was cause to assess discipline and that the assessment of demerits was just, appropriate and warranted. The Company maintains the discipline assessed should not be disturbed.

FOR THE UNION:

(SGD.) W. Apsey

Regional Representative

FOR THE COMPANY:

(SGD.) D. Pezzaniti

Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen

S. Oliver

J. Shaw

– Labour Relations Manager, Calgary

– Labour Relations Manager, Calgary

– Labour Relations Officer, Calgary

And on behalf of the Union:

K. Stuebing

W. Apsey

J. Campebell

D. Carron

– Counsel, Caley Wray, Toronto

– General Chairperson, Smiths Falls

– General Chairperson, Peterborough

– Grievor, Nepean

AWARD OF THE ARBITRATOR

1. The issue giving rise to this dispute is the 15 demerits assessed to Conductor Mr. Carron for two alleged unacceptable occurrences of absenteeism and one missed call. Several procedural flaws were raised by the Union. Having regard to my finding that there was no misconduct warranting discipline, it is unnecessary to examine the objections raised by the Union.

2. On August 6, 2018, Mr. Carron missed a call for an assignment. As a Conductor, he is placed on call, on days where he is deemed available to work. The Company system will generate three (3) phone calls and allow the employee 15 minutes to return the call. Mr. Carron acknowledges missing the call but claims he returned the call within the allotted time. The Investigation Officer “offset the missed call” during the

investigation and essentially forgave it. The Company is now relying on that incident to discipline Mr. Carron.

3. With respect to the alleged unacceptable absences, Mr. Carron booked off sick on August 19 (1st occurrence) and 30 (2nd occurrence), 2018. He was not on assignment but was deemed available to work and placed on call. Mr. Carron was never asked to provide any medical information, nor was the veracity of his medical situation questioned by his supervisors at any time prior to the investigation.

4. The Company alleges that in accordance with the T&E Availability Standards Policy, *“employees who book off sick on two or more available work days in the calendar month will be subject to attendance review”*. According to the T&E Policy, “missed calls” will be handled as more serious offenses. In all occurrences, disciplinary action may result.

5. First, I will deal with the alleged missed call incident. The Company waited nearly two months to convene a formal investigation in connection to the absences. During the investigation, Mr. Carron was asked a question to obtain clarifications related to the missed call. Before Mr. Carron responded, the Investigation Officer stated that he would “offset this call”, as Mr. Carron reached out to him and responded to the call within the time allowed. No further questions were asked, and the Company adduced no further evidence related to this incident.

6. I am compelled to find, based on the evidence presented, that Mr. Carron responded within the time allotted. This is hardly an occurrence meeting the threshold of misconduct. Rather, it appears to be a missed educational and coaching opportunity to reinforce protocol.

7. This leaves Mr. Carron with questions related to the instances of booking off sick. For the first time during the investigation, he was asked whether he sought medical attention in connection with the days he called in sick. He admits to having booked off sick for the first occurrence and not reaching out to local management for assistance. Regarding the second occurrence, Mr. Carron claims he booked off sick and did reach out to management to advise that he was injured. He sought medical assistance and informed his supervisor of such. According to Mr. Carron, his supervisor denied granting him time off to improve his health and was told to book off sick, which he did. That occurrence was managed by the Company's OHS department, as an off-duty related injury. Mr. Carron provided notification of his absence, as required.

8. There was no evidence adduced by the Company to question Mr. Carron's inability to work. The Company was aware of Mr. Carron's injury and did not request a medical assessment or medical documentation in addition to what Mr. Carron had already provided. The Company did not challenge the legitimacy of the illness. I am unable to find that Mr. Carron inappropriately booked off sick. Consequently, I find there is no basis for any discipline in relation to the absences.

This Office has consistently found that discipline for absences must be assessed on the basis of evidence, not suspicion.¹ In accordance with section 239 (1) of the *Canada Labour Code*, an employee should not be punished for being ill or unfit to work: “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.”

9. While I understand the complexity of the 24/7 operations and the importance of attendance management, there is simply no medical evidence to persuade me that Mr. Carron mischaracterized his absences from work and should have been disciplined for culpable absences. I am confident Mr. Carron will abide with the requisite notification procedures by informing the Company adequately for future absences.

10. I order that the 15 demerits be stricken from Mr. Carron’s record immediately.

11. I order that Mr. Carron be made whole for his losses, if any.

12. I shall remain seized with respect to the application, interpretation, and implementation of this award.

August 10, 2020



AMAL GARZOUZI
ARBITRATOR

¹ CROA & AD 3639, 3863, 3921, 4340, 4630