

IN THE MATTER OF ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

AH: 782

DISPUTE:

Appeal of the 15 demerits assessed to Conductor Wade Blackwood.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Blackwood was assessed discipline as noted in his Form 104 as follows,

“A Formal investigation was issued to you in connection with the occurrence outlined below:

“Your alleged violation of T&E Availability Standard Information Bulletin Effective February 1st, 2017 and re-issued October 24th, 2018, No-SO-067-18” for your booking sick on the dates of November 6,7,8, 2019.”

Formal investigation was conducted on December 17th, 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 the following, T&E availability standard operating bulletin No-SI-064-18.

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

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

UNION'S POSITION:

The Union contends that any discipline assessed in this matter is in violation of the Consolidated Collective Agreement, the Canada Labour Code 239, 125, CROA 1588, Employment Equity, Policies 1300/1500.

Mr. Blackwood had 1 sick book off during the period to be investigated. The Company questioned the sick time which was outside of reasonableness and of the length of time post issue to statement. No pattern absenteeism was established. The Company did not establish any culpability. Mr. Blackwood was not asked to produce a sick note as per code. Mr. Blackwood is the judge of his own condition as per General Rule A. The Company's T&E Availability Standard Canada is under separate grievance and does not form part of the Collective Agreement.

Mr. Blackwood was sick and being sick is being human and the part of business metrics includes balancing its manpower numbers to properly run its business needs based on the human factor. No

established pattern can be recognized for sick book offs. No educational component is served in disciplining an employee who is ill. Being sick is not a “behaviour” that can be deduced in this example and therefore needs not be addressed.

The Union requests that the discipline assessed (15 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 Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances and in line with the principles of progressive discipline.

The Company disagrees with the Union’s insinuation the Availability Standard is inappropriate; the Company considers it to be an effective tool in managing their workforce. Until the alleged issue regarding the T&E Availability Standard Canada is resolved, the Company considers it to be in effect and therefore discipline assessed is valid. It must be noted that the dispute pertaining to the T&E Availability Standard is under separate grievance and therefore not properly before the arbitrator as a matter of this file.

Further, the Union suggests the Company has violated the Collective Agreement, the Canada Labour Code 239, 125, CROA 1588, Employment Equity, Policies 1300/1500, and the Company’s own policy but fails to identify what provisions were allegedly violated.

Failure to specifically reference any argument or to take exception to any statement presented as “fact” does not constitute acquiescence to the contents thereof. 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:

FOR THE COMPANY:

Signed

Signed

Wayne Apsey
General Chairperson CTY
TCRC

Lauren McGinley
Assistant Director Labour Relations
CP Rail

January 10, 2022

Hearing: February 17, 2022 - By videoconference

FOR THE UNION:

Ken Stubing, Caley Wray
Wayne Apsey, General Chairperson
Wade Blackwood, Grievor

FOR THE COMPANY:

Elliot Allen, Labour Relations
Lauren McGinely, Assistant Director Labour Relations

AWARD

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 Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. In accordance with their agreement, this award is without precedent to any other matter 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.

[2] 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

[3] On November 6, 2019, Mr. Blackwood booked sick in the middle of the night at 01:19. He did not book back on until November 8, 2019 at 19:04. The Company submits that when calling into the Crew Management Center (CMC) Mr. Blackwood stated to the crew dispatcher that he wished to book unfit. Following protocol, the crew dispatcher asked Mr. Blackwood if he had spoken to a manager. It says that typically the crew dispatcher would then connect the individual with the manager to inform the company officer that the employee would be booking unfit and the reason. Instead of complying with routine, Mr. Blackwood said no and hung up the phone on the dispatcher.

[4] After Mr. Blackwood hung up on the Crew Dispatcher, he made a phone call to Daryl Monk, CP Rail Road Foreman informing him he would be booking off. Mr. Blackwood did not provide a medical note nor did he seek medical attention for his illness. The Company says that a fair and impartial investigation held on December 17, 2019 established the Grievor was in violation of T&E Availability Standard Bulletin NO SI-064-18. During the investigation, the Grievor

confirmed that he hung up on Crew Management when booking unfit as set out in Q&A 19 of his statement providing:

Q19: Appendix A, shows that you told the CMC that you don't need to speak with anyone and hung up is this correct?

A19: Yes.

[5] The Company maintains that the investigation confirmed that Mr. Blackwood was in violation of Operating Bulletin NO: SO-067-18 issued October 23, 2018 by booking sick. CP submits that the investigation clearly established that the Grievor was culpable for a violation of the Company's Attendance Standard and therefore discipline was warranted. The Company maintains the assessment of 15 demerits was progressive. The Company needs to ensure that the Attendance Standard is adhered to, and the Hybrid Discipline & Accountability Guidelines are followed to address any matter that is in violation of the standards.

[6] The Grievor, Wade Blackwood, is 48 years of age and hired on with the Company on March 22, 2004. The Union submits that prior to this matter, the Grievor's disciplinary record reflects only two instances of discipline. In 2007, he received a caution for not wearing safety glasses. In 2008, he received 10 demerits for not lining a switch correctly, resulting in a derailment. For the next 11 years he received no discipline whatsoever until 2019.

[7] The Union has argued that with this case the Company decided to begin building a discipline record with arbitrary and unwarranted penalties. It says the Grievor did not have any prior discipline for absenteeism issues, nor is there any suggestion or allegation anywhere of a "pattern" on the Grievor's part.

[8] The Union pointed me to the comments of Arbitrator Sims in CROA 4621 regarding Company Efficiency Testing Reports and what should properly constitute a record given disclosure obligations. The Union objected to the inclusion of Efficiency Testing Reports and Ride Reports being put before the arbitrator in this case. However, I find the reports give further evidence of the Grievor's reliability and mitigate against any reason for discipline. There is no evidence of previous discipline in the 11-year period as noted by the Union. Further, his Performance Testing and Ride information are very positive.

[9] The Union submits that the Company is unable to establish cause for any discipline as assessed in the Form 104. The Union notes that there is no allegation of pattern or excessive absenteeism in the Form 104. One single instance of absence from work is the subject of investigation, without any suggestion of wrongful access to sick leave on this occasion.

[10] The Union submits that it is well-established that the mere absence from actual work assignments does not, in and by itself, rise to the level of culpable behaviour and subsequently attract discipline. In respect of the single absence under review, the Grievor was never asked to provide any further medical information, nor was the veracity of the Grievor's medical condition questioned by his supervisors at any time prior to, or during, the investigation.

[11] The Company refers to *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.); *U.A.W. v. Massey-Ferguson Ltd. Ontario*, [1969] O.L.A.A. No. 2, 20 L.A.C. 370, P.C. Weiler; *Canada Post Corp. v CUPW (Martin)*; 1992 Carswell Nat 2127, K. Burkett; *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009

CanLII 31586 (ON LRB) D. Gee and CROA & DR 4715-D, 3981, and 4406. The Union refers to railway CROA decisions CROA 1588, 4340, 3863, 4621, 4630, 4524 and AD Hoc 750.

[12] The Company maintains that availability standards are not suggestions, and they are certainly not an option for employees to freely choose whether or not to comply. It says due diligence and compliance is expected of all safety critical employees.

[13] The Company says that, in the present case, it is clear that the Grievor failed to meet the expectations provided by the availability standards. His notice clearly provided:

Formal investigation was conducted on December 17th, 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 the following, T&E availability standard operating bulletin No-SI-064-18.

Emphasis Added

[14] However, the evidence established through the investigation was not thorough and did not develop all the facts or circumstances. The Grievor did call the Crew Management Centre to book sick or unfit in the middle of the night. The Grievor acknowledged that his responses to the questions and his tone during that call was abrupt. He expressed regret for his tone during the call as established during the investigation by the Grievor stating:

Q17: Appendix A, confirms that you didn't want to speak with a manager when you booked off sick

A17: Yes

Union note there is no obligation to speak with a manager when booking off sick

Q18: Appendix A, shows that you told the CMC that you don't need to speak with anyone and hung up is this correct?

A18: Correct

Q19: Why would you have spoken with the CMC Dispatcher in this manner?

A19: I regret what I did, I was frustrated and impatient at the time.

[15] The Grievor maintained he was unfit to work and called Road Foreman Monk as requested by the CMC. There was no incident report or memo provided at the investigation from Mr. Monk regarding the content of that call. Trainmaster Kenneth Gough conducted the investigation December 12, 2019 and was reviewed by Superintendent Derek Harter at Step One of the Grievance procedure.

[16] The investigation process is often noted by arbitrators as the foundation for assessing discipline. The review of the discipline during the grievance and arbitration of any discipline is often largely based on the investigation. The integrity of the entire process is dependent on a fair and impartial investigation. Getting to the facts is the essence of an investigation as noted at Q&A 7 of this Grievor's investigation as stated by the investigating officer and Trainmaster Kenneth Gough. A credible review of the alleged facts during the grievance process, as conducted by Superintendent Greg Harter in this case, is also a consideration at arbitration.

[17] I take notice of the fact that Trainmaster K. Gough was the investigating officer in a grievance concerning 30-demerits assessed to Conductor Maclean Campbell resulting in a decision by me dated December 18, 2021. In that case, a memo was provided at the investigation by Senior Trainmaster Aaron Twomey who has spoken with the Grievor regarding the incident. I found that the 30 Demerits were warranted in that case and within the range of discipline appropriate given all the facts supported by Trainmaster Twomey's memo.

[18] In this case, Conductor Wade Blackwood spoke with Road Foreman Monk following his conversation with the CMC. Trainmaster K. Gough did not provide any incident report or memo from Road Foreman Monk who was similarly involved. In addition, the Union requested disclosure of all evidence.

[19] In my view, in the circumstances of this case, getting at the truth and correctly providing a decision requires disclosure of available evidence. Mr. Monk had specific and detailed knowledge about the Grievor's booking off. Although the Company may not be relying on the testimony or evidence of Mr. Monk, it would not be just to allow CP to pick and choose what evidence to disclose respecting the facts in issue. It could have assisted the Union in assessing the veracity of the information as to the existence and the extent of the alleged violation of the Availability Standards. Such additional evidence may assist the Union in its representation of the Grievor and may assist an arbitrator in correctly rendering a decision.

[20] In addition, as in the M. Campbell case, CP Superintendent G. Harter responded to the grievance at Step One of the process on March 19, 2020. A review of his response indicates a form letter response to the grievance with insertion of applicable questions and answers from the investigation to substantiate the Grievor's knowledge of the Availability Standards. He did not address the substance of the alleged violation

[21] CP says the Grievor simply decided to ignore his responsibility and refused to speak to a Company officer. After reviewing the submissions of the parties and particularly the Investigation Statement of the Grievor, I have difficulty with the Company's position. The Grievor's conversation with Road Foreman Monk, a Company officer was not challenged. Further, the investigation established:

- a) The Grievor called the CMC to book sick.
- b) Following the Grievor's call with the CMC he did call a CP manager, Road Foreman Monk and spoke with him.
- c) No evidence was produced to reflect a similar pattern of past unavailability by the Grievor.
- d) No incident report or memo from Road Foreman Monk regarding his conversation was provided at the investigation. He did not give evidence at the Grievor's disciplinary investigation.
- e) No request was made for a medical note or certificate from the Grievor.
- f) The Union requested disclosure of all evidence.

[22] The long service Grievor had no discipline for the past nine years. His overall record was excellent and no discipline in his career for any attendance issue. He booked sick in the middle of

the night stating he was frustrated and impatient with the CMC. It was an unusual occurrence and conduct for the Grievor. He was asked if he sought medical attention. He was not asked in the investigation if he was aware or of the Employee Assistance program as I have seen in other investigations.

[23] I appreciate that the Company was approaching the Holiday Season when the availability of train crew employees is essential to this 24/7 operation. The Grievor's out of character response to the CMC would raise concern and the resulting follow up by the Company is reasonable. However, the evidence does not establish a violation of the availability standards. The Company's failing to provide an incident report or memo from Road Foreman Monk gives rise to greater concern regarding the fairness of the investigation process.

[24] Superintendent Harter assessed the discipline following the investigation. He also reviewed and declined that Step One grievance. His assessment and response in grievance process gives rise to concern that a proper review of mitigating factors were not considered before or after accessing the discipline.

[25] In the final analysis, I find the words of Arbitrator M. Picher in CROA 3863 most applicable in these facts:

To put it simply, employees cannot be disciplined or punished for being ill or physically unfit to work.

[26] In view of all of the foregoing, I order that the 15 demerits be removed from the Grievor's record.

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

Dated this 10th, day of May, 2022.

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

Tom Hodges
Arbitrator