

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**TEAMSTERS CANADA RAILWAY CONFERENCE**

(the "Union")

- and -

**CANADIAN PACIFIC RAILWAY COMPANY**

(the "Company")

**JOINT STATEMENT OF ISSUE**

**DISPUTE:**

Appeal regarding the dismissal of Conductor Lucas Frost of Thunder Bay, ON.

**JOINT STATEMENT OF ISSUE:**

On September 28, 2017 Mr. Frost was required to attend an investigation in connection with "Your missed call at 0520 on September 8<sup>th</sup>, 2017 as an Engineer for the XYRES in Thunder Bay, Ontario."

Following the investigation Mr. Frost was dismissed from Company service as follows:

"Please be advised that you have been dismissed from Company Service effective October 22, 2017 for failing to fulfill your contractual obligation of the Canadian Pacific Attendance Management Policy. Outlined below are the violations and escalation of occurrences.

10 Day Deferred Suspension  
Unauthorized absence from work April 17, 2017 to June 2, 2017

20 Day Deferred Suspension & Last Chance Agreement  
Missed call June 25, 2017

30 Day Deferred Suspension  
Not being available for work when properly called on July 15, 2017

Missed call September 8, 2017

The above mentioned incidents constitute a culminating violation of CP Policy and warrants your immediate dismissal."

**UNION'S POSITION:**

On September 8, 2017, the Grievor's was unavailable to take a call for an ad hoc call as a Locomotive Engineer. The Union submits Mr. Frost's regular position at the time of the alleged missed call was not scheduled for work as described above. Further, Mr. Frost did not miss a call but rather was unavailable due to a medical appointment.

The Union further contends the Company has failed to meet the burden of proof required to sustain formal discipline as described on the employee notification letter and the further allegations of a missed call. The Grievor was previously disciplined for the incidents referenced on the letter and the Company cannot discipline him again. The notification letter references a last chance agreement which the Union denies existing. As a result, the discipline assessed to Mr. Frost is unjustified, unwarranted and excessive in all the circumstances, including mitigating factors evident. The discipline is also contrary to the Collective Agreement and arbitral jurisprudence.

The Union requests that the discipline be removed in its entirety, that Mr. Frost be reinstated without loss of seniority and benefits, and that he 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'S POSITION:**

The Company has denied the Union's request.

The Company maintains the Grievor's culpability was established during the fair and impartial investigation and the discipline was properly assessed in line with both the Collective Agreement and arbitral jurisprudence.

The Grievor contends he missed the call as a result of having attended a doctor's appointment; however, he failed to notify the Company or take proactive action to obtain the required time off. Nor, did he attempt to rectify the situation once his absence was recorded as a missed call.

In assessing dismissal, the Company relied on the culminating incident doctrine, considering the whole record of discipline in determining what penalty was appropriate for the final act on September 8, 2017.

The Company's position is 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:

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Dave Fulton  
General Chairman  
TCRC CTY West

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Sharney Oliver  
Labour Relations Manager  
CP Rail

August 19, 2019

There appeared on behalf of the Company:

Sharney Oliver	-Manager, Labour Relations, Calgary
Lauren McGinley	-Assistant Director, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	-Counsel, Caley Wray, Toronto
D. Fulton	-General Chairman, Calgary
D. Edward	-Senior Vice-Chairman, Calgary
E. Johnson	-Local Chairman, Thunder Bay
W. Pitts	-Vice General Chairman, Moose Jaw
L. Frost	-Grievor, Thunder Bay

### **AWARD OF THE ARBITRATOR**

The grievor entered the service of the Company on March 14, 2011 and qualified as a Locomotive Engineer in July 2015. He was discharged on October 22, 2017.

The grievor was working on the Yard Spareboard in Thunder Bay. His regular position as a Spare employee on the Yard Spareboard was to relieve Yard Foremen and Yardmen in the Thunder Bay Yard.

He was rested and available to be called into the Yard Service on September 8, 2017.

The grievor, as a qualified Locomotive Engineer, was also eligible for Engineer Service Brakemen (“ESB”) assignments. This was not part of the grievor’s regularly assigned work.

The grievor had checked with the Crew Management Centre on the evening of September 7, 2017 and it appeared that he would not be receiving a call for his regular Yard Service work until the afternoon of September 8, 2017. There was also no indication when he checked with the Crew Management Centre that there were any ESB assignments scheduled for September 8, 2017. Given his seniority, the grievor was the first call-out for any potential ESB assignment on September 8, 2017.

The grievor did in fact get called by the Crew Dispatcher for an ESB assignment at 5:00 a.m. on September 8, 2017. He answered the call and advised the Crew Dispatcher that he had previously arranged for a medical appointment that day and was not in a position to take the call for the ESB assignment. The Crew Dispatcher told him that he would be shown in the system as a “missed call”. The grievor then requested that he be conferenced in with his immediate Supervisor, Trainmaster Tim Ray, to discuss being excused from attending work due to his medical appointment. The Crew Dispatcher then contacted Mr. Ray. Mr. Ray advised the Crew Dispatcher that he could not provide the necessary time off authorization and that the grievor would have to request permission

from the Acting Superintendent, Mr. Plummer, for a leave of absence. The grievor decided not to disturb Mr. Plummer. He stated in that regard at the investigation:

Q 36: Did you contact Troy Plummer?

A 36: I did not at the time as he marked me down as a missed call.

Q 37: Why didn't you make an attempt to call him and clarify the situation?

A 37: Because it was 5 o'clock in the morning.

The grievor did attend for his medical appointment on September 8, 2017. He produced a medical certificate from a walk-in clinic dated September 8, 2017 which states that he was unable to attend work that day due to a medical concern. He was asked the following about the medical appointment at his investigation:

Q 29: How long did you know that you had a doctor's appointment?

A 29: I had forgotten about it and remembered the night before.

Q 30: Did you call anybody when you realized you had an appointment?

A 30: No

Q 31: Why didn't you call anybody?

A 31: The last time I checked the board it didn't look like I was going to work and thought I could still make the appointment.

The grievor was subsequently called by the Company on September 8, 2017 to work in Road Service on an unassigned freight train beginning at 2:00 p.m. on September 8, 2017.

The Company, in argument, cited the often-quoted tripartite test set out in *Wm. Scott & Co v. C.F.A.W., Local P-162* [1977] 1 C.L. R.B. R. 1 of Chair Paul Weiler

**13.** Instead arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

The Company notes that the grievor was assessed a 30-day deferred suspension on August 11, 2017 for not being available to work when called on July 15, 2017. His form 104 clearly indicated that his job was in jeopardy if he committed another offence which warranted discipline, particularly an offence of this kind which the Company considers to be a serious offense. Further, the Company submits that the grievor had a number of legitimate avenues available to him to secure time off if needed. It is the Company's view that the grievor, at the very least, should have immediately contacted the Crew Dispatcher on the evening of September 7, 2017 to book time off when he remembered that his medical appointment was scheduled for the following day. Instead, the grievor waited until he was called by the Company for an ESB assignment and then told the Crew Dispatcher that he had a prior medical appointment.

I agree with the Company that the issue of attendance is of serious concern and must be viewed within the context of the occupational requirements of a Conductor to work on an on-call basis. This reflects the nature of railway operations as a business which runs 24 hours a day, 7 days a week from coast to coast. The Company, it is also

worth noting, considers certain absence categories as serious offences. At the top of the list in *Information Bulletin on Availability to T & E Employees* is missed calls:

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

- Miss calls (including missing calls as an ESB).

The importance of attendance and the need for timely notice to the Company of a request for time off is referenced in **CROA 3902** where Arbitrator Picher found that a Conductor should have booked off sick for his sore back:

I deal firstly with the issue of the grievor's refusing a call. His explanation is that on the night prior to the call, which he received at approximately 8:00 a.m. Halifax time, he had been involved in moving his girlfriend from one apartment to another, as a result of which he awoke with serious back pain. While the precise times do not emerge from the investigation, it is unclear to the Arbitrator that the grievor could not have communicated with the Company before it made its call to him, in order to book off sick as would have been his obligation. Rather, he simply awaited the call which came, and at that point declined the call. It does not appear disputed that having taken some muscle relaxants he did book back on later the same day.

The grievor did not contact the Company and book off on the night of September 7, 2017 when he remembered that he had a medical appointment the following day. Similar to **CROA 3902**, I find the grievor's failure to call in once he remembered his medical appointment merits discipline.

What is the appropriate penalty under the circumstances?

The grievor's discipline record does not contain any alleged operating infractions but rather involves attendance issues. A significant mitigating factor in my view is that the grievor's attendance issues were related, at least in part, to addiction issues which he

has taken steps to address in a positive fashion since his dismissal. An additional mitigating factor is that Mr. Ray, the grievor's immediate supervisor, left it to the grievor to wake up the Assistant Superintendent at 5:00 a.m. rather than deal with a routine request for time off for a medical appointment himself.

The Union submits that the negotiated penalty for the grievor, given his status as a volunteer LEEB employee, is the loss of chance to be called as a Locomotive Engineer, as per the analysis of Arbitrator Clarke in **CROA 4631**<sup>1</sup>. The only reference to this issue during the course of the grievance procedure was a short bullet point reference, amongst ten other bullet points, in the Union's Step 2 grievance. The Company, understandably, did not provide any written submissions on this point in their Step 2 Reply, nor in their brief, given the single cursory reference to the issue in the grievance. In the absence of further and complete submissions by the Company on this point, I accept the Company's argument that to deal with this point at this juncture in the proceedings would be contrary to Rule 9 of the *"Memorandum of Agreement Establishing the CROA & DR"* that: *"No Dispute of the nature set forth in section (A) of clause 6 may be referred through to the last step of the grievance procedure provided in the applicable collective agreement"*. See: **CROA 4623**.

Having considered all the facts, I find that the grievor's dismissal, despite his escalating record for similar violations of Company policy, should be set aside. To award compensation, however, would send the wrong message. The grievor's continuing

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<sup>1</sup> Condition #3 reads: "A qualified Locomotive Engineer who is first out on the LEEB and not available for service when called will not be subject to a call as a Locomotive Engineer for 12 hours".



pattern of failing to call in advance for a leave of absence, as his record demonstrates, still merits a strong disciplinary response. A written warning, a penalty that has been imposed in a number of cases cited by the Union involving a missed call, would not be an appropriate disciplinary response in this case.

The grievor shall be reinstated forthwith with a period of suspension to be substituted from the date of his dismissal to the day of his reinstatement. His reinstatement shall be without compensation, and without loss of seniority.



**John Moreau QC**

**October 2, 2019**