

IN THE MATTER OF AN ARBITRATION

BETWEEN

BOMBARDIER TRANSPORTATION CANADA INC. (BTC)

And

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

Yevgen Lystukha – Remedy

Date: December 22, 2020

Arbitrator: Graham J. Clarke

Appearing for BTC:

D. McDonald: Counsel, Norton Rose Fulbright

N. Hyppolite: Counsel, Norton Rose Fulbright

A. Ignace: Human Resource Manager

C. Henripin: Human Resource Advisor

Appearing for TCRC:

A. Stevens: Counsel, Caley Wray, Toronto

W. Apsey: General Chairperson, Smiths Falls

Heard via written submissions ending on December 18, 2020

Award (Remedy)

BACKGROUND

1. On October 23, 2020, the arbitrator issued *AH710*¹ which overturned a permanent demotion that BTC had imposed on Mr. Yevgen Lystukha. That decision returned him to his conductor position.

2. Since the parties had earlier settled the locomotive engineer's discipline for the same emergency stop incident, the arbitrator remitted the suspension issue back to the parties:

31. In sum, BTC did not demonstrate that Mr. Lystukha's conduct, while deserving of discipline, merited a permanent demotion to his former position of maintainer. His lesser responsibility for the August 7, 2019 incident and his candour, albeit delayed, merits instead a suspension.

32. **The arbitrator remits to the parties the issue of the length of the suspension given that they have already settled the engineer's grievance on mutually acceptable terms.** The parties may return before the arbitrator if they are unable to agree on the appropriate penalty and ancillary remedies.

(emphasis added)

3. The parties could not agree on the appropriate discipline. The TCRC suggested a 2-week suspension while BTC argued for 3 months. Ironically, Mr. Lystukha earned more in his former maintainer position than he would have had he continued to work as a conductor. BTC further submitted that Mr. Lystukha would have to either serve the suspension or pay the equivalent wages back.

4. For the following reasons, the arbitrator has decided to replace the original permanent demotion with a 2-month suspension. That 2-month suspension is considered served given the fact that BTC had removed Mr. Lystukha from his conductor position for 14 months. No compensation is owing since Mr. Lystukha worked and avoided any financial losses.

¹ [Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference, 2020 CanLII 82182](#)

ISSUES

5. The arbitrator must answer two questions:
 - A. What is the appropriate suspension for Mr. Lystukha? and
 - B. Must Mr. Lystukha serve the suspension or reimburse the equivalent wages?

ANALYSIS AND DECISION

Introduction

6. The arbitrator highlights these key facts:
 1. BTC disciplined the locomotive engineer and Conductor Lystukha following an August 7, 2019 incident where a commuter train's speed required an emergency stop;
 2. BTC originally suspended the locomotive engineer for 6 months, but the parties later settled his grievance;
 3. Mr. Lystukha's disciplinary record contained a 5-day suspension from May 2019;
 4. BTC permanently demoted Conductor Lystukha to his former maintainer position;
 5. *AH710* concluded that Mr. Lystukha had a lesser responsibility than the locomotive engineer for the August 7, 2019 incident;
 6. *AH710* found BTC's permanent demotion constituted an excessive disciplinary response;
 7. BTC had removed Mr. Lystukha from his conductor position for a total of 14 months (September 4, 2019 to November 3, 2020);
 8. Mr. Lystukha earned more income working as a BTC maintainer than he would have in his conductor position.
7. Article 60(2) of the *Canada Labour Code*² (*Code*) sets out an arbitrator's power to modify a disciplinary penalty:

² [RSC 1985, c L-2](#)

(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, **the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.**

(Emphasis added)

A. What is the appropriate suspension for Mr. Lystukha?

8. The TCRC urged the arbitrator to impose a two-week suspension. In the alternative, it asked that any suspension be less than that imposed on the engineer:

The Union takes the position that a two (2) week suspension would be sufficient and reasonable under the circumstances, in light of the mitigating factors outlined herein and the law as recognized and applied by this Board.

In the alternative, without prejudice to this primary position, the Union submits the conductor should serve no more than 50% of the suspension ultimately served by the engineer on crew³.

9. BTC pleaded in favour of a 3-month suspension, which may have been what the engineer received⁴:

12. The engineer involved in this Incident received a suspension of 90 days and received retraining before resuming his functions. It is Bombardier's position that the Grievor should receive the same length of suspension, given his previous disciplinary record and his inadvertence and disregard for CROR⁵.

10. BTC also asked the arbitrator to defer to and accept its position because a three-month suspension fell within the range of possible disciplinary decisions:

³ TCRC: December 11, 2020 submission

⁴ The TCRC noted in its December 11, 2020 submission that despite the original 6-month suspension, BTC brought the engineer back to work early. The parties later negotiated a Memorandum of Settlement.

⁵ BTC: December 14, 2020 submission

21. Bombardier acknowledges that there may be some range to the length of suspension that is appropriate in the present case. CROA caselaw is instructive insofar as the facts and the violations of safety rules are similar, however, every case will depend on certain unique details. For this reason, Bombardier submits that a 90 days suspension is within the range of possible disciplinary decisions that would be appropriate in the circumstances.

22. The arbitral jurisprudence is clear that an employer's disciplinary decision should not be interfered with unless it is outside the "ballpark" of what is fair (Natrell Inc v Teamsters, Local 647 (2005), 136 LAC (4th) 284, at para 63 Tab 4; see also Re Weyerhaeuser Co v United Steelworkers, Local I-207 (2007), 159 LAC (4th) 56 (Power), at para 18) Tab 5. (sic)

11. BTC did not persuade the arbitrator that any type of "ballpark" analysis applies to this case. BTC's "disciplinary decision" did not impose a 3-month suspension. It instead imposed a permanent demotion which the arbitrator found excessive given the applicable case law. That penalty became a 14-month demotion following Mr. Lystukha's return to his conductor position. Neither the TCRC's nor BTC's submissions on penalty are entitled to any deference. The appropriate suspension is the question the arbitrator must now decide under s.60(2) of the *Code*.

12. The parties did not dispute that the August 7, 2019 incident merited discipline. Mr. Lystukha and the locomotive engineer had care and control of a commuter train when it made an emergency stop due to speeding.

13. BTC's concerns were understandable given that Mr. Lystukha was less than forthcoming during his initial interview. The TCRC may have had similar concerns which might explain why both Mr. Lystukha and the engineer sent letters to BTC soon afterwards acknowledging their failures and responsibilities. BTC then conducted second interviews for both crew members before imposing the original discipline.

14. Mr. Lystukha's conduct merits more than the 2-week suspension proposed by the TCRC. Given Mr. Lystukha's previous discipline, but lesser responsibility for the emergency stop when compared with that of the engineer, the arbitrator substitutes a 2-month suspension for the permanent (14 months ultimately) demotion Bombardier imposed⁶.

⁶ While each case depends on its own facts, [CROA 4203](#) is a similar case involving different levels of responsibility between crew members and, notably, a "substantial number of rules violations" in the case of the grievor.

B. Must Mr. Lystukha serve the suspension or reimburse the equivalent wages?

15. As noted above, section 60(2) of the *Code* empowers the arbitrator to substitute “such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances”.

16. In its submissions, BTC argued that Mr. Lystukha will have to either serve the suspension or reimburse the equivalent wages:

25. During his demotion, the Grievor earned more wages than he would have as a conductor. **Wages earned during the length of his suspension will also need to be deducted, or his suspension will need to be served.** Attached at Tab 7 is a spreadsheet of wages earned and owing⁷.

...

According to the spreadsheet found at Tab 7 of the Employer’s submissions on penalty, Mr. Lystukha's total earnings for the period of September 4, 2019, to October 31, 2020, was \$ 112 542,49. His salary as a conductor for the same period would be \$ 98 683,60. The Grievor made more money than if he were a conductor during that period, such that no additional wages are owed. If he had served a suspension without pay he would have lost additional wages that he was paid as a maintainer (i.e. for a 90 day suspension he would have lost a total of \$20 659,60). **The Grievor will need to reimburse the money for his suspension that he did not serve or he will need to serve his suspension⁸.**

(Emphasis added)

17. The arbitrator disagrees that either of BTC’s suggested options constitutes a “just and reasonable” penalty. BTC’s reasoning overlooks the fact that Mr. Lystukha’s permanent demotion, which removed him from his conductor position for 14 months, already constituted a significant penalty. BTC’s suggested remedy would add a supplemental penalty to the original penalty the arbitrator had already found excessive in *AH710*.

18. This does not mean that Mr. Lystukha has avoided any consequences arising from his conduct on August 7, 2019. His disciplinary record, which already contained a 5-day

⁷ BTC December 14, 2020 submission

⁸ BTC December 18, 2020 submission

suspension, now also includes a 2-month suspension. Mr. Lystukha would be wise to take to heart Arbitrator Picher's comments on progressive discipline in the railway industry:

If employees are to have the advantage of a system of progressive discipline, so must employers⁹.

19. While Mr. Lystukha earned more as a maintainer than he would have by continuing as a conductor, the arbitrator views this somewhat novel situation as comparable to an employee successfully mitigating all losses. Such an employee would not owe the employer any excess sums earned upon being reinstated. Rather, those earnings effectively insulate the employer against an additional compensation order.

DISPOSITION

20. The arbitrator has determined that a 2-month suspension will replace the permanent demotion in Mr. Lystukha's discipline record. Given that BTC already penalized Mr. Lystukha by demoting him from his conductor position for 14 months, that suspension has already been served. BTC's requested remedy that Mr. Lystukha serve the suspension, or reimburse the equivalent wages, would not constitute a just and reasonable penalty under the *Code*.

21. Given these somewhat novel circumstances, BTC owes no monetary compensation to Mr. Lystukha.

22. The arbitrator remains seized for any issues flowing from this award.

SIGNED at Ottawa this 22nd day of December 2020.



Graham J. Clarke
Arbitrator

⁹ [CROA 3314](#) as cited in [CROA 4664](#) at paragraph 26.