

AH 716 (B)

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

- and -

**INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
(SYSTEM COUNCIL NO. 11)**

(the "Union")

Re: Darren Miller Dismissal

Arbitrator

Richard I. Hornung, Q.C.

For the Company

Diana Zurbuchen - Manager Labour Relations

Ivette Suarez - Labour Relations Officer

Nick Gaber - Assistant Director S&C Operations

Cory Wogrinc - Assistant General Manager S&C Operations

For the Union

Denis Ellickson – Counsel

Lee Hooper – General Chairman

Randy Roberts – Local Representative

Darren Miller - Grievor

Hearing

December 1, 2020

Calgary, Alberta

I

1. On April 21, 2020, S&C Maintainer Darren Miller (the “Grievor”) was dismissed from his employment at CP for the reasons set forth in a Form 104 (Company, Tab 1), as follows:

Please be advised that you have been DISMISSED for the following reasons: A formal investigation was conducted on March 25th, 2020 and a supplemental investigation was conducted on April 16th to develop all the facts and circumstances surrounding your attendance and SAP claims for full day’s pay on March 3 and March 6, 2020, your 2 year switch test performed at Malakwa West on February 21, 2020 and your 1 month track circuit test performed on March 6 2020 at Canoe CTC bungalow. At the conclusion of the investigations, your culpability was established regarding your entering of full day’s wages on March 3 and March 6, 2020, falsifying of regulatory testing at Malakwa West on February 21, 2020, falsifying of regulatory testing at Canoe on March 6, 2020. A violation of...

2. The Form 104 continues with a detailed list of the violations.
3. Neither the facts nor the Grievor’s culpability are in issue. As set forth in the Union’s Ex Parte Statement, the only issue is the extent of discipline imposed:

It is the position of the Union that the penalty of termination was excessive and unwarranted in all of the circumstances and ought to be reduced. The Grievor should be returned to employment without loss of seniority or benefits and with full compensation. Alternatively, the Union takes the position that the penalty ought to be reduced and the Grievor reinstated on appropriate terms.

II

CIRCUMSTANCES**March 3, 2020 – Time Claim**

4. On March 3, 2020, Rick Cowley, the Assistant Director S&C Operations BCI, was conducting a scheduled Safety Walkabout in the area where the Grievor was to be working that day. According to Mr. Cowley (Company Tab 10) after his first stop, he searched the GPS tracker to see if he could meet with another S&C employee in the area.

5. He then noticed that the Grievor's truck was at the Walmart parking lot in Salmon Arm. He drove to Salmon Arm, found the Grievor's truck in front of Staples, and engaged him in a conversation. The Grievor told him that he was shopping for a printer for the tool house at Sicamous. Mr. Cowley asked him if he had a purchasing card and the Grievor replied, "no" that he was just checking out prices so he could tell the Company's purchasing agent which one to buy.
6. Mr. Cowley instructed him to leave the purchasing to the appropriate officer. He then asked the Grievor what work he had done that morning as it was already 11:45 AM. The Grievor told him he had repaired a bond at Canoe. Following which, Mr. Cowley noticed that the Grievor had on running type shoes. He asked the Grievor if he put his work boots on every time he stops his truck to do work. The Grievor said: "yes, I do". Mr. Cowley then asked to see his work boots. He was shown a clean pair of "muck boots" which were not the type the Grievor should be wearing on the day in question. Finally, Mr. Cowley advised the Grievor that the "expectation was that he comes to work and fulfills his duties for 9 hours per day", which the Grievor acknowledged he understood.
7. The GPS logs (Company Tab 10) show that, at that point in the day, the Grievor's truck had spent 55:48 minutes at his residence; 11 minutes at Walmart; 25 minutes at Canadian Tire and an unspecified time at Staples. Immediately following their conversation, the Grievor drove directly to his residence where he spent a further 55 minutes. His activities reflect that he had not done a bond installation at Canoe as he stated. And, although he spent 4 hours and 52 minutes driving around, his first stop at a right of way was for 11 minutes at Malakwa at 14:25.
8. In his investigation, the Grievor explained the delay in starting work on the morning of March 3, 2020 as well as his two subsequent stops at home for approximately 1 hour each on that day:

...one of the kids was home with the Flu and with all of this stuff going on my girlfriend did not want to leave the house. My girlfriend phoned me to ask if I could help with a couple of things and I agreed to it.

9. In addition, he allowed that (Q.20):

I believe that was the day I went to Walmart to pick up a prescription that was pre-ordered for my girlfriend. I also believe that was the day I went to Mark's Work Warehouse to look for work boots.

10. It is significant that neither of the above explanations, given at his investigation (Q.17 and Q.20), were provided to Mr. Cowley at the time of their discussion in front of Staples.
11. The Grievor confirmed that he did not notify his Manager of his absence or lateness on March 3, 2020; and, that he entered a full day into SAP which he stated he was not entitled to.

March 6, 2020 – Time Claim

12. On March 6, 2020, as a follow-up to their conversation on March 3, 2020, Mr. Cowley checked on the Grievor's start time to see how he was responding to the expectations they discussed.
13. The evidence disclosed that although the Grievor's start time is 6:00, he began work at 7:22:

As a follow up with Mr. Miller on Tuesday March 3 about being at work, I checked up on his start time and how he was responding now to the expectations set forth. Today he started at 07:22 which is 1 hour and 22 minutes after his start time. His first stop was at Tim Hortons and then proceeded to drive around. I met with Mr. Miller around 11:30 AM at Annis east back track where he was bonding a sperry rail. I asked him when he started today and he replied 6:30. I asked him what time he is supposed to start and he replied 06:00. I asked him what happened when he started later and he replied: "I had to take a shit". I did inform him that his truck tells a different story. ... I explained that he was being sent home with pay to reflect on his actions and to return to normal start time at 06:00 Tuesday after his life day Monday the 9th of March.

14. At his investigation the following exchange took place (Q.27):

Q.27 As per Appendix 14 – Mr. Cowley stated you had proceeded to drive around after stopping at Tim Hortons. Please explain where you had been driving around that day and do you agree that you had stopped at Tim Hortons

A. Yes, I stopped at Tim Hortons and the night before was an all nighter, I just wasn't in the right head space. Sometimes I drive around to clear my head. I find sitting in one spot doesn't clear my head.

15. He explained that an “*all nighter*” meant that he had spent the night awake attending to his girlfriend’s daughter who was ill and had thrown up. With all the Covid-19 fears they had to disinfect the bed. As a result he did not get to sleep until 04:00 – 05:00.

16. The Grievor confirmed that he did not notify his Manager, on March 6, 2020, of his absence or lateness and that he entered a full day into SAP which he stated he was not entitled to.

17. The events of March 3rd and 6th, 2020 alerted Mr. Cowley to possible problems with the Grievor’s performance. He decided to do back-up checks and found that on March 6th and 16th, the Grievor had either failed to perform the necessary tests or failed to accurately report his inspections.

March 6, 2020 - Regulatory Test

18. At his investigation, the Grievor initially said that he had done a 1 month track circuit regulatory crossing test at mile 57.00 on March 6, 2020, and recorded it in the Crossing Bungalow - Mile 57.08 (Q.33). However, he subsequently agreed that there was no written record of the test in the log-book and, although he had recorded that he had done the test, he did not do so.

19. The Grievor justified his conduct on the basis that he saw that another Maintainer (Franco Bafaro) had been at the crossing and then he recorded the test as if he

had done it himself (Q. 35). Ultimately, he agreed (Q.38) that the test was not completed. In all events, despite no test being performed by him, the Grievor submitted an inspection report into Raildocs that it had been done.

20. Finally, he confirmed that he was aware that regulatory testing - the Raildoc System and onsite log books - are used to verify tests, and that entering a test as completed when it was not could be considered falsifying a legal document.

March 16, 2020 - Regulatory Test

21. The Grievor admitted that on March 16, 2020, although he reported the completion of a 1 month grade crossing test at Mile 57.08 Crossing he did not perform all of the duties required.
22. Notwithstanding his admission discussed in paragraphs 17-18 above that he did not do the test on March 6, 2020, his explanation for his failure to complete the test on March 16, 2020 was that he “... *didn't do the Bungalow due part due to the test being performed on March 6, 2020*” (Q. 39).

February 21, 2020 - Regulatory Test

23. During the investigation it was discovered that the Grievor failed to complete the 2 year switch test at Malakwa. Initially the Grievor stated that he performed the test. However, following further examination, he conceded that he did not perform the complete test required but nevertheless entered it as complete in Raildocs. His explanation for his conduct was as follows (Q.53):

Q.53 *Can you please explain why you had entered a completed Two-Year Switch Test at Malakwa West, if in answer 47 you confirm not all required tests were completed?*

A. *I ran out of time while we were doing it. I knew I had until the 21st following Friday came and rail traffic was busy. I went there and there was no way I was going to get any time, so I figured to myself, I did enough testing to call it safe. I did all the adjustments prior to February 21st.*

Again, he allowed that entering a completed test when it was not done could be considered falsifying a legal document/test and put CP Rail and himself in a precarious position. (Q.'s 48-50).

III

ARGUMENT

Company

24. The Company points out that on 3 occasions the Grievor falsified inspection records (which placed both train operations and public safety at risk) and on 2 occasions falsified his time sheets (constituting theft of time). It argues that the facts establish that his conduct was not a momentary aberration or mind lapse but rather a conscious falsification of the relevant records.
25. It emphasises that the falsification of his attendance records and his lack of justification for his absences was aggravated by his initial denials coupled with his frame of mind which prompted him, at one point, to say: *“I went there and there was no way I was going to get any time so I figured to myself, I did enough testing to call it safe”*.
26. It asserts that the Grievor with his long-term tenure was fully aware of the obligation to complete the tests and report them accurately as well as the grave consequences which could arise from his failure to follow the testing procedures.
27. It points out that the job requirements of S&C Maintainers – and the fact that they work independently - underscores the reliance which the Company placed on the Grievor’s honesty and integrity in filing his reports and SAP claims accurately. It argues that his repeated and deliberate breach of his obligations, leads to the inescapable conclusion that the employment relationship between he and the Company is no longer viable in that the Company’s trust in the Grievor’s ability to

carry out his duties as expected, has been destroyed. It urges therefore that the grievance be denied.

Union

28. In its Brief, the Union does not dispute that the Grievor failed to perform his work to the acceptable standard which, both the Company and Union agree, must be maintained. However, it urges that the specific circumstance in the Grievor's case be taken into consideration.
29. It points out that the Grievor took full responsibility for his transgressions and that he showed genuine remorse from the outset of the investigative process. It argues that his conduct, although wrong, did not exhibit a conscious, pre-mediated or persistent pattern to defraud the Company of time or a deliberate dereliction of his reporting duties.
30. On both March 3rd and March 6th, circumstances in the Grievor's life were beyond his control and his error should be viewed as a "*failure to advise*" his Supervisor of the time spent away rather than a claim of fraud. It asserts that his conduct is an example of carelessness brought on by an employee operating with an overriding concern for the welfare of his family in a world already anxious over the Covid-19 pandemic. It suggests that his failures to complete the tests and record them accurately, is an example of an individual acting in a careless rather a pre-mediated fashion.
31. Finally, the Union argues that the Grievor's admissions, acceptance of responsibility and remorse, when taken with his lengthy service, should convince me that the bond of trust between him and the Company is not permanently severed. Most importantly, it relies on the Grievor's long service and points out that he has been with the Company for 29 years with an unblemished record for the past 24 years.

IV

DECISION**Time Claims**

32. Like other employees in the S&C Department, the Grievor submits his own time claims into the SAP payroll system. That system is an honor system. Once he enters his information, his time claim is automatically approved and paid out on the next payday. While the Company periodically audits the payrolls, there is no preview or pre-authorization required before the time claims are paid to employees. Consequently, the Grievor's conduct affects not only his relationship with the Company but brings into focus the larger issue of the integrity of the honour system which affects his fellow employees. In order for the honour system to operate effectively, it is incumbent on employees to ensure that their time is justified and honestly entered into the SAP.
33. It represents disciplinable conduct for an employee to leave work without management's authorization and without a reasonable belief that such permission was unnecessary (*UNA v. AHS; 2015 CanLii 25074*). In this case, the Grievor's misconduct on March 3 and 6, 2020, considerably exceeded that threshold. On both dates he chose – without authorization - to misappropriate time which was due to the Company. He did so knowing that his conduct was wrong.
34. I reach this conclusion regarding his **March 3, 2020**, conduct primarily because:
- At his investigation he allowed that he was assisting his girlfriend in caring for her ailing child and that he needed to pick up a prescription for his girlfriend. However, that is not the explanation he provided to Mr. Cowley at the time he was confronted in front of Staples. Instead, he provided a disingenuous pretext of searching for a printer to use at the workplace.

- He told Mr. Cowley that he had already done a bond installation at Canoe prior to their meeting up. However, it is apparent from the GPS records (Tab 10) that he had not done so.
- In fact, the Grievor did not make any stops along the CP right of way that day until 14:25 at Malakwa.
- At the end of their discussion in front of Staples - rather than return to work after he was advised to do so - the Grievor drove directly back to his home and spent a further 55 minutes there when he should have been at work.

35. On **March 6, 2020**:

- The Grievor's start time was to be at 6:00. The evidence shows that he started work at 7:22 a full hour and 22 minutes late.
- Thereafter he drove directly to Tim Hortons.
- Then he just drove around to "clear his head" without going to work.
- When Mr. Cowley met him, at approximately 11:30, and asked why he started late that morning, the Grievor replied: "*I had to take a shit*".

36. At the investigation the Grievor's explanation for his conduct on March 6, 2020 was that he had a late night attending to a sick child, and he: "*just wasn't in the right head space ... sometimes I drive around to clear my head, I find sitting in one spot doesn't clear my head*" (Q.27). Frankly, his explanation lacks any mitigating circumstances that might justify his failure to seek authorization for his absence and leaves me with more questions than answers.

37. In my view the inference is irresistible that the Grievor deliberately chose not to work a full day, on both March 3rd and 6th. He did so without seeking or receiving authorization; and, notwithstanding the same, he entered a full day's pay into SAP for each of the days.
38. I am unable, therefore, to accept the Union's argument that the Grievor's error was in failing to advise his Supervisor of the time spent away from work. Rather I conclude, on balance, that the Grievor's actions to claim the full day on SAP were planned and deliberate knowing that he was not entitled to do so. As such his conduct represents both an abuse of the honour system and a purposeful falsification of the SAP record with intent to be compensated for hours of work which he did not perform.

Falsification of Records

39. The railways are a highly regulated industry with a heightened awareness and focus both on safety standards as well as compliance with the consequential requirements of regulatory reporting.
40. Because they work essentially without supervision in a safety sensitive environment, it is critical that S&C employees (considering the regulatory requirements and the safety consequences) fully attend to their employment duties and, accurately and honestly, report their inspections into the log-books and Raildocs. With the independence of the S&C Maintainer position, comes the consequent burden of responsibility and trust. Persons occupying a position of trust are especially at risk when they violate that trust (*Langley Memorial Hospital v HEU, Local 180, [1985] 18 LAC (3d) 123*).
41. At the investigation, the Grievor attempted to justify the record falsifications on the basis, *inter alia*: that he had done enough to justify recording a completed test; that he would not have had time to complete the test; that he had investigated the site previously and was comfortable that it was safe; and, that another S&C

employee had been there so he knew it was done properly. However, notwithstanding these explanations, the conclusion is inescapable that he repeatedly and intentionally falsified the required regulatory testing on March 6, March 16 and February 21, 2020.

42. In **AH 700** similar findings of fact were arrived and it was concluded:

His transgressions were not momentary or involuntary aberrations. They continued over a period of almost two months. Given the same, the inescapable inference is that they were premeditated. ... I conclude that the prolonged, persistent and consistent nature of the Grievor's dishonesty on his SAP claims, let alone the jeopardy in which he put the operational safety of the Company by the abandonment of his duties and falsification of inspection records, are simply too significant to be outweighed by the circumstances to such degree to warrant his reinstatement.

43. In **Ad Hoc 650**, Arbitrator Silverman concluded the following relative to the falsification of records:

I am not persuaded that the Grievor simply made a mistake in both not performing the tests and then noting on SCIS that he had done them. The conduct occurred rather consistently over a period of time. The Company found five occasions where the Grievor claimed to have performed tests that he did not in fact perform. The fact is that these incidents occurred five times in five months for these specific tests suggests that this was more than mere inadvertence.

44. In the circumstances, I reach a similar conclusion (to those above) here. The Grievor's falsification of records began on February 21, 2020 and continued until March 16, 2020. They were not momentary or involuntary aberrations. There is every indication that the Grievor knew what he was doing throughout the period in question. In addition, and quite apart from the Grievor's failure to perform essential tests necessary to ensure the overall safety of train operations, he was not candid or forthright with his explanations of why he did what he did.

Bond of Trust

45. The Company argues that the Grievor's conduct has irrevocably broken the bond of trust between them and that continuing to have him employed would place a hardship and risk to the Company business and the safety of its operations.
46. In response, the Union relies primarily on the Grievor's length of service and his preceding 24 years of discipline free conduct. It points out that the Grievor's previous good record, his long service and, the fact that it was an "*isolated incident in (his) employment history*" are all appropriate factors to be considered as outlined in *William Scott (1977) 1 Can.L.R.B.R. 1*.
47. While the first two considerations are self evident, it asserts that the circumstances surrounding the 5 incidents described in this award should be viewed as "*an isolated incident*" in that they represented a comparatively isolated time frame in the long employment history of the Grievor. Further, it suggests that the Grievor's, immediate acceptance of responsibility is a significant mitigating factor which should be considered.
48. The position of an S&C Maintainer is a safety sensitive job to which the Company entrusts the maintenance, repair and testing of the systems and equipment necessary to assure the safe movement of trains throughout the rail network. Maintainers are required to conduct mandatory, regulatory testing and inspections of the signal system and crossing protection equipment. Given the job requirements, as well as its independent nature, mutual trust is an indispensable component for the continuation of employment.
49. In *McKinley v BC Tel, 2001 SCC 38, [2001] 2 SCR 161*, Mr. Justice Lacobucci discusses the approach to be taken when dishonesty is the cause for discipline. He concludes at paragraph 57:

Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess

whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

50. In dishonesty cases the fundamental question to be addressed is whether the conduct at issue is reconcilable with sustaining the employment relationship. (*University of Saskatchewan v. Canadian Union of Public Employees, Local 1975; 2020 CanLii 108773 (Ish)*). Put more succinctly, has the trust relationship between the employee and the Company been irreparably breached?
51. In addressing the above question, I am obliged to take into consideration the 20 day suspension - upheld in **AH 716 (A)** - which now also forms part of the Grievor's record. The conclusion arrived at therein confirms that the Grievor's breach involved a misappropriation of the Company's Mifi in Cuba. Accordingly, for the purposes of answering the "bond of trust" question, there are 6 transgressions over a period of approximately 3 months, all of which involve pre-meditated breaches of the Company's policy/rules, and all of which involve a degree of dishonesty.
52. Exacerbating the Grievor's situation is the fact that, he was in a position of trust, working unsupervised, in a safety sensitive environment which directly impacts the safety of both his fellow employees and the general public.
53. Other than the justification involving the illness of his girlfriend's daughter – which, although raised at the investigation, are inconsistent with his initial explanations - no acceptable mitigating circumstances were provided to explain his failure to notify his Supervisor of his absences. Nor were any provided which adequately account for his falsification of the records. Weighed against the fact that the Grievor accepted responsibility for his violations once they were discovered, is the

reality that he also provided disingenuous or otherwise inconsistent explanations with respect to the incidents.

54. Although many examples exist where long service employees are provided a second chance based on their service and disciplinary records, the circumstances of each case are unique. In assessing the Grievor's conduct here, I am mindful of Arbitrator Kates' comments in **CROA 1344**:

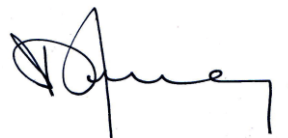
*... the grievor's situation involves a pattern of misconduct with respect to numerous incidents over a protracted period. Moreover, each incident involved the grievor's deliberate, premeditated act of falsification in violation of a known rule of the company. No excuse, ...was forthcoming that would explain the grievor's unacceptable behaviour. And, because no adequate explanation or extenuating circumstance was forthcoming that would cause me to mitigate the discharge penalty, I have had no reason presented to reinstate the grievor, who is a relatively short term employee, to a position where he will be required to perform the same duties without employer supervision. **In other words, the company has established just cause for the action it has taken and therefore it should not be required to assume a continued risk to its business enterprise by retaining an employee whose confidence has been tainted.** (emphasis added)*

55. Although this case involved a relatively short term employee, the comments in the excerpt above apply irrespective of the length of service.
56. As most experienced arbitrators will agree, there is a reluctance to confirm the dismissal of a long-term employee. Nevertheless the clear obligation remains to address the specific circumstances of this case and answer the difficult question whether or not the trust relationship between the Grievor and the Company has been irreparably breached.
57. Notwithstanding the Grievor's long service; his discipline record until January 2020; his acceptance of responsibility; and his stated remorse, his conduct between January 2020 and March 16, 2020, reveals a persistent dishonesty over a two month period which includes: the misappropriation of the Company's Mifi; falsification of SAP claims; and the falsification of records related to the Grievor's core duties. It underscores the fact that his transgressions were not momentary

aberrations. The inescapable inference is that it was deliberate. Add to that the safety sensitive nature of his unsupervised work, his position of trust and the jeopardy in which he put both the operational safety of the Company and the public, leaves me with no alternative but to accept the Company's argument that the bond of trust has been broken.

58. Despite my reluctance having regard to his lengthy service, I am not comfortable reinstating the Grievor to his unsupervised position of trust thereby compelling the Company to assume a continued risk to its business by retaining an employee whose confidence has been tainted.
59. If the Grievor is to be reinstated, it falls to the Company to do so should the parties determine appropriate conditions upon which that can be done.
60. The grievance is dismissed.

Dated this 18th day of February, 2021.

A handwritten signature in black ink, appearing to read 'R. Hornung', with a stylized flourish at the end.

Richard I. Hornung, Q.C.
Arbitrator