AH 722

IN THE MATTER OF ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY

(The "Company")

-and-

TEAMSTERS CANADA RAIL CONFERENCE

(The "Union")

Jesse James Dismissal
Grievance No. 501-02-534

Arbitrator:
Richard I. Hornung, Q.C.

For the Company:

Francine Billings	Manager, Labour Relations
Diana Zurbuchen	Manager, Labour Relations

For the Union:

Ken Stuebing	Counsel
Joe Bishop	Senior Vice General Chairperson Locomotive Engineers - MacTier
Ed Mogus	General Chairperson Locomotive Engineers - Oakville
Jesse James	Grievor

Hearing
March 1, 2021
Via Zoom

AWARD

I

1. Prior to the commencement of the hearing the parties filed the following Joint Statement of Issue:

> ***JOINT STATEMENT OF ISSUE***
>
> ***Dispute****:*
> *The dismissal of Locomotive Engineer J. James of London, Ontario.*
>
> ***Joint Statement of Issue****:*
> *On February 10, 2020, the Grievor was dismissed from Company Service as per 104, "for submitting fraudulent claims in CMC from September 9, 2019 to December 17, 2019, while working as a Locomotive Engineer. A violation of CMA Honour System, including Collective Agreement Article 5(4) picking up and setting out units and Collective Agreement 48.02 Initial Terminal".*
>
> ***Union Position****:*
> *The Union contends the discipline is excessive in the circumstances.*
>
> *Locomotive Engineer James has approximately 32 years with Canadian Pacific Railway. He hired in January of 1989, qualified as a Conductor later in 1989 and then qualified as a Locomotive Engineer in 1991. His career at Canadian Pacific has been both rewarding and difficult. On July 29th, 2009, Mr. James lost the left leg below the knee in an accident while working the Woodstock Road Switcher. With dedication and perseverance, he was able adapt to using a prosthetic leg and re-integrate fully as a running trade employee where he has been set up full time as a Locomotive Engineer. He has also been recognized and thanked by the Company for going above and beyond when on March 5, 2017 he assisted with train 235-05 in clearing the main line and crossing in downtown London, Ontario. The Local Management stated, "Its employees like you with good work ethic that helps us continue to maintain our high level of safety and service to our customers." Mr. James regularly achieves his maximum monthly mileage.*
>
> *The Union contends there are mitigating factors which ought to be considered in Mr. James' case.*
>
> *The form 104 states in part "…and Collective Agreement 48.02 Initial Terminal."*
>
> *At Q&A 19, the Investigating Officer asks Mr. James:*
>
> *Q19: As per Appendix A, on 190918 you entered a CT claim for train 147-18 at 3250 and received compensation of 1:40 time, what is the entitlement for this claim?*

A19: I am not entitled to it I guess."

Mr. James is uncertain as to how to respond given the evidence contained within Appendix A which is reproduced as follows: 190918 147-18- CT entered for S/O and lifting the same cars for an over length meet, counted the entire time that they waited. This should not be a claim at all, CNDR Josh Van Eck.

Two CT Claims entered for 2 different locations. Not sure which one is referenced, no additional comments then to what was entered below.

03250 0140 CTT S/O 24 Lift 24 BT01

- *If confirmed CT claimed for the incorrect time.*

The red remarks are those of the auditor. He simply stated incorrect time which is what prompted Mr. James indecisive answer as evidenced in Q&A 19.

Q.20 referencing Article 48.02 is not related to any claim or specific Q&A which lends to the ambiguity of Mr. James' answers.

With specific regard to the portion of the form 104 identifying Article 5(4) "…picking up and setting out units…" the Union submits the following: The Company issued bulletin SI-069-19 on December 12, 2019. The bulletin read: "SUBJECT: PU Claim for Pick-up or Set-Out of Locomotives-Entitlement Clarification". Within the bulletin, it stipulates that an audit identified "misunderstandings by some employees" which is what prompted the issuance of the bulletin. This bulletin was issued after Mr. James had made the claims identified in Appendix A. This recognition by the Company ought to be a mitigating circumstance for the duplicate claims of PU/EC. These claims were recovered.

Further, with regard to the TT&J claims it must be noted that the TT&J claim is a new Article to employees in eastern Canada given its inclusion in the current CBA however, it is not explicit within Article that duplicate payments are not permitted with the exception of picking up or setting out of unit(s).

Notwithstanding the above arguments, the Union does not dismiss the seriousness in the allegations against Mr. James. Mr. James has had a trying second half to 2019. He and his wife of 21 years split at the end of June. Concerned of Mr. James' well-being, his now ex-wife called EFAP who engaged counsellors and support for Mr. James. EFAP further followed up with Mr. James in November, December and especially around the holidays. Superintendent Duquette was aware of Mr. James' circumstances. This is by no means an excuse for his actions.

The Union contends that Mr. James, now being dismissed, has paid the ultimate price and has absolutely learned a most valuable lesson. Arbitral jurisprudence has recognized long service as a mitigating factor. We further

contend that Mr. James can once again be an asset to CP as he was recognized in 2017 by the same Superintendent as today. It must be noted that the Company recovered $1686.59 from Mr. James.

The Company provided the Step 2 response as per video conference handling guidelines.

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union requests that the Company re-instate Mr. James immediately with lost wages and benefits and no loss of seniority. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

***Company Position**:*
The Company does not agree with the position of the Union, the discipline as assessed was warranted and appropriate.

The Company maintains the Grievor, a long serving employee, submitted fraudulent wage claims he was not entitled payment for as a result.

His claims of forgetting to contact the CMC Auditor do not relinquish his responsibility under the CMA Honour System to make the necessary adjustments himself if invalid. He had the knowledge and access to correct these claims without the likely need of a CMC Auditor.

The Company maintains the Grievor severed the bond of trust and that the discipline was assessed aptly with respect to this incident.

Any mitigation suggested is insufficient to alter the decision of the Company to dismiss the Grievor.

II

2. Mr. Jesse James (the "Grievor") joined the Company in January 1989 as a Trainman Trainee. At the time of his dismissal, his position was that of a Locomotive Engineer. He had accumulated 31 years of seniority.

3. Prior to his dismissal, the Grievor had been previously disciplined for improper wage claims in 2007.

4. On January 23, 2020, the Grievor was served with a Notice to Appear at an investigation on January 30, 2020: *"… in connection with claims submitted by [him] while working as a Locomotive Engineer"*.

5. Attached to the Notice were 18 Appendices (Company, Tab 6) outlining claims identified by the Company's auditors which were put in issue at the investigation. Following the investigation, the Company concluded that the Grievor was not entitled to all, or part of, 13 claims involving 9 unique claim-codes and totalling $1,686.59. The 13 claims are as set out in the Company's submission at Para. 16. A summary of those claims and the Grievor's responses at the investigation, as well as relevant portions the JSI and Union's arguments are as follows:

   a. **September 9, 2019 (190909)** – PU (Pick Up) claim for train 235-09 at location 0371 totaling $24.33:
      i. At **Q.17**, The Grievor admits that: *"After reading the bulletin there is no entitlement to [the claim]*"; and, agrees that: "*As per Collective Agreement Article 5(4) [he understands] that this claim is not permitted"*.
      ii. Although not raised by the Grievor at the time, the Union asserts, in the JSI and subsequently in its submission that the "*Bulletin*" (*Information Bulleting SI-069-19*; Union Tab 6) referred to by the Grievor was not published by the Company until December 12, 2019. As indicated therein, the Bulletin was intended to deal with "*identified misunderstandings*" regarding *PU Claims* for *Pick-Up* or *Set Out*. Accordingly it argues that the "*uncertainty*" surrounding the interpretation of the relevant Article - which necessitated a clarification Bulletin - ought properly to be taken into consideration as a mitigating circumstance relative to the Grievor's claims notwithstanding his admissions at the Investigation.

b. **September 15, 2019 (190915)** - TJ and EC claim entered on October 24, 2019 for train T29-15 at location 3360 totaling $43.75:

   i. The Grievor admits, at **Q.30**, that he was not entitled to this payment.

c. **September 16, 2019 (190916)** – HC claim for rules class totaling $732.08 of which $245.38 was over-claimed.

   i. **Q.31**: The Grievor admits that: "*After reviewing the collective agreement, I now know that I am only entitled to 100 miles*"

d. **September 19, 2019 (190918)** – CT claim for train 147-18 at location 3250 for 1 hour, 40 minutes of time:

   i. At **Q.19** the Grievor admits that he was not entitled to compensation for 1:40 time.

   ii. At **Q.20** the Grievor is asked if, pursuant to Article 48.02 the claim is not permitted, to which her responds: "*Yes now I do*".

   iii. In the JSI, and its submissions, the Union contends that the reference to Article 48.02 is unrelated to the claim made and because of that both the Auditor's language, and the question posed, is unclear and the Grievor was thus confused. It is fitting to observe that although the argument regarding the confusion is well honed – both in the JSI and the Union's submission – the Grievor makes no mention of any confusion when he responds to the question.

e. **September 21, 2019 (190921)** – PU (Pick Up) claim for train 254-21 at location 3250 totaling $24.33:

   i. At **Q.21** the Grievor was asked what entitlement there was for him to claim $24.33. He responded: "*Nothing*".

f. **September 24, 2019 (190924)** – DB claim for train 2TEC-23 totaling $24.33:

   i. At **Q.22** the Grievor was asked what the entitlement for this claim was. He responded: "*I understand now there is no entitlement*".

g. **September 27, 2019 (190927)** - PU (Pick Up) claim for train 141-26 at location 3375 totaling $24.33:
   i. At **Q.24** the Grievor was asked what the entitlement for this claim was. He responded: "*Not entitled to it*".

h. **September 28, 2019 (190928)** - PU (Pick Up) claim for train 2244-26 at location 3375 totaling $24.33:
   i. At **Q.25** the Grievor was asked what the entitlement for this claim was. He responded: "*I am not entitled to the one in Windsor*".

i. **September 29, 2019 (190929)** - TJ and EC claim entered on October 24, 2019 for train T29-29 at location 3360 totaling $29.16:
   i. At **Q.32** the Grievor was asked what the entitlement was for the above Claim. He responded: "*Not entitled to it*".

j. **October 24, 2019 (191024)** – PU (Pick Up) claim for train 325-24 at location 3250 totaling $24.33:
   i. At **Q.34** the Grievor was asked what the entitlement was for the above Claim. He responded: "*I am not entitled to it*".

k. **November 3, 2019 (191103)** – TJ and EC claim for train T29-03 at location 3360 totaling $48.67:
   i. At **Q.27** the Grievor was asked what the entitlement was for the above Claim. He responded: "*No entitlement*".

l. **November 21, 2019 (191121)** – HC claim for Remote Training totaling $338.85:
   i. **At Q.35** the Grievor was asked what the entitlement was for the above Claim. He responded: "*2 of the three as per Appendix A, I didn't keep track of my turn and just kept hitting enter*"

m. **November 22, 2019 (191122)** – TO claim totaling $304.23:

i. At **Q.36**: "*Did you make any other claims for this training*? A: "*I guess yes. I entered a TO claim, I was going to call the auditor and have it removed*".

ii. And, at **Q.37:** "*The TO claim submitted was 191122 and you received compensation of $304.23, is this correct?"* A: No answer recorded.

iii. Finally, at **Q.38:** "*As per answer 36, when did you plan on calling the Auditor to correct this claim*?" A: "*I forgot*".

6. The Union contends that there are mitigating factors surrounding the impugned claims which ought to be considered. They include, *inter alia*:

a. Given the confusion in the questions (Q.19 – 20), the reference to *Article 48*, and the subsequent publication of a Bulletin on July 21, 2020 clarifying how to correctly claim conductor only terminal work allowance, the Grievor was entitled to the claim re: 190918;

b. The fact that other employees were not subjected to the same scrutiny regarding their wage claims;

c. The fact that Mr. James was confused in providing some of his answers;

d. The fact that *TT&J* claims were a new entitlement to employees in eastern Canada and, because there were no explanatory bulletins accompanying the same, confusion in submitting claims was understandable; and

e. The fact (discussed earlier) that the "*Bulletin*" referred to in paragraph 5(a)(ii), above, was not published by the Company until December 12, 2019.

7. Despite the Union's extensive submissions, I am unable to conclude that the Grievor's conduct - in submitting what were essentially false claims - was justifiable either due to error, confusion, inattention or misapprehension of the requirements of the Collective Agreement or the *CMA Hour System Manual*, to the extent that it would sufficiently diminish or otherwise excuse his culpability.

8. The Grievor's answers at the investigation (to his credit) were succinct and direct. His explanations – when provided – were considered by the Company and as demonstrated by the fact that only 13 of the 18 original claims were acted upon and provided as grounds for his dismissal.

9. While the Union's thorough submissions are commendable in attempting to justify or mitigate his actions, the Grievor himself - given a full opportunity to do so at the investigation stage - did not provide similar explanations or justifications for his conduct. With the exception of 3 instances, the Grievor made no attempt to explain or otherwise provide any facts during the investigation which might assist in justifying/explaining his conduct. It is one thing to refer to the December 12, 2019 Bulletin to support a retrospective justification for a misunderstanding that might have existed with regard to *PU* claims, it is another thing to then claim the benefit of that misunderstanding without any explanation from the Grievor as to why or how a misunderstanding arose and /or applied to the individual improper claims submitted by him.

10. Even accepting the argument proffered by the Union in 5(a)(ii) above and applying it to all the *PU* claims, one would then have to accept that the remaining 8 improper claims submitted by the Grievor were due to carelessness, a misunderstanding, or a lack of familiarity with the nature of the claim. To do so, considering the Grievor's seniority and experience, would strain credulity beyond its breaking point. Further, even were I to accept the Union's submissions with respect to the *PU/Set-Off/TJ/EC* and *HC* claims (which I do not), the fact remains

that the Grievor categorically admitted to submitting (and collecting) on a improper *TO* claim (Q.36–38) for $304.23 which he "*forgot*" to call the Auditor on.

11. The Grievor is a long-standing employee with 31 years of experience who held a significant leadership position with the Union. Considering his years of service and his knowledge, he should reasonably have been aware of both his obligations under the *Honour System* and the process involved in submitting proper wage claims. Further he ought to have been aware of the necessity - if he was uncertain of his claim - to file an *IP* claim or otherwise contact an appropriate Company official or Union officer in order to ensure the proper submissions of his claims.

12. To exacerbate these circumstances, the Grievor – on two occasions - submitted "*standalone*" claims which involved his going back into the system, after the fact, to purposely enter a false claim. No explanation was provided other than his admission that he was not entitled to make the claims. Entering a standalone claim is not a passive action based on a misunderstanding in the moment. In this case, it was an intentional action taken by the Grievor to file a claim which he knew, or ought to have known, he was not entitled to.

13. The time period over which the Grievor filed the false claims extended from September to December 2019. Unlike the circumstances discussed in **AH 723**, his actions were not an aberration related to a single incident or a single repetitive entry code related to the same work. The false claims were submitted by the Grievor, over a period of 3 months, on 13 separate occasions, using 9 separate codes. The entries by the Grievor were not aberrations or unintentional entries which involved a lapse of judgment. Rather, the inescapable inference, given the number of claims made; the various codes which needed to be entered; and the manner in which they were done, over the time in question, is that the Grievor knowingly engaged in a scheme to increase his pay in a manner he knew, or reasonably should have known, was inconsistent with the *Honour System* and the

Collective Agreement. Regrettably, I must conclude that his conduct was intentional and fraudulent.

14. As such, the conduct of the Grievor was a form of theft (**CROA 2669**) which undermined the relationship of trust essential to the nature of the Grievor's job and warrants the most serious measure of discipline.

15. As recently stated in **AH 716 (B)**:

> *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. … Put more succinctly, has the trust relationship between the employee and the Company been irreparably breached?*

16. As discussed in **AH 716 (B),** there is a reluctance – which I share - to confirm the dismissal of a long-term employee. Nevertheless, the obligation falls to the arbitrator to address the specific circumstances of each case and answer the difficult question: whether or not the trust relationship between the Grievor and the Company has been irreparably breached.

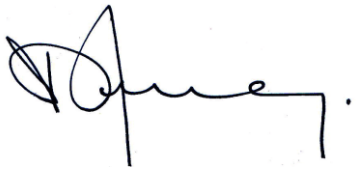
17. In addition to the mitigation submissions related to the individual claims made by the Grievor, the Union highlighted both his disability - as a result of a workplace accident - and the difficult strain that he under the relevant time following upon the unravelling of his 21 year marriage; which ultimately led to his seeking support through EAP.

18. I have considered both the explanations regarding each of the claims made, as well as the Grievor's personal difficulties. While I am particularly sympathetic as regards his personal problem, the explanations offered in mitigation do not justify or explain his conduct to the extent that they outweigh the seriousness of his actions and overcome the damage he has done to the trust that is essential to building an employment relationship.

19. Despite my reluctance having regard to his lengthy service, I am not comfortable reinstating the Grievor to his position of trust thereby compelling the Company to assume a continued risk to its business by retaining an employee whose confidence has been tainted. Given the circumstances, re-instatement – if it is to occur at all - is a decision that should be left to the Company should the parties determine appropriate conditions under which that can be done.

20. The Grievance is dismissed.

Dated at Calgary, Alberta this 2nd day of June, 2021.



Richard I. Hornung, Q.C.
Arbitrator