

IN THE MATTER OF AN AD HOC ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE
(the TCRC)
AND
CANADIAN PACIFIC RAILWAY COMPANY
(CP)

AH 749

DISPUTE:

Appeal of the dismissal of Conductor Maclean Campbell on January 6, 2020.

JOINT STATEMENT OF ISSUE:

Following an Investigation, Conductor Campbell was dismissed as shown in his Form 104 as follows,

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

“Your Time Claims Submitted while RCLS Training between the dates of November 25th to November 28th, 2019.”

Formal investigation was conducted on December 12, 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 falsified time claims that were entered.

In consideration of the decision stated above, please be advised that you have been dismissed from company service effective January 6, 2020. Notwithstanding the above mentioned incident, based on your previous discipline history, this incident constitutes a culminating incident which warrants dismissal.

UNION'S POSITION:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends as below.

The Union's position is that the dismissal of Mr. Campbell was excessive and unwarranted as provided within our grievances. The Union contends that the disciplined assessed in these matters is excessive in all circumstances. Mr. Campbell did not submit claims on said dates to intentionally break any rules. Mr. Campbell attended the investigation and was forthright throughout. The Company had questioned his claims during the investigation and he honestly answered that he made the claims in one input some 5 days later and made errors in the submissions which he had adjusted one of the particular dates to remove the claim as soon as he was notified of the errors. The Company had the ability to review, audit, and approve or deny all claims in contention prior to an investigation and give Mr. Campbell the chance to realize the error he made prior to outright dismissal as the solution. Mr. Campbell admitted that the situation was taken very seriously by the Company and as such he answered *yes, as do I take them very seriously* and later, *I take this very*

seriously and not lightly. The Union contends that this was an out-of-character mistake. The Company has not taken these mitigating factors into account and as such has unreasonably and excessively disciplined Mr. Campbell. The purpose of an investigation is to gain facts about what has taken place, look at preventive measures to ensure this does not happen again and most importantly to educate. It is unfortunate that after the investigation that dismissal was the result.

The Union’s position is that the Company has wrongly dismissed Mr. Campbell. The Company had the right to decline his claims, and then if warranted, after Mr. Campbell reviewed his inputted claims, he would have realized his mistake and/or the Union would have had the opportunity to grieve if it felt there was a violation of the CBA for any declinations. Additionally, Mr. Campbell, with Union representation, could have been called in to discuss and be provided education on the honour system and the importance of checking one’s time slips.

The Company failed to respond to the Union’s Step 1 grievance which violates Article 40 “Letter RE: Management of Grievances & The Scheduling of Cases at CROA.

The Union requests that the dismissal of Conductor Campbell be expunged, and he be made whole for his lost earnings/benefits with interest, without loss of seniority or pension.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY’S POSITION:

The Company disagrees and denied the Union’s request.

The Company maintains a high level of trust is placed upon employees who enter their time in an Honour system. The Grievor fully admitted he did not show up for work between the abovementioned dates, yet entered time in order to receive payment. The Company maintains that culpability was established, which the Union concedes in its Step 2 grievance. The Company considered all factors and maintains that dismissal was warranted and an appropriate quantum of discipline, given the significance of the infraction and the Grievor’s disciplinary history.

Without precedent or prejudice to the Company’s aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes “made whole.

The Union has further stated a desire to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

FOR THE COMPANY:

Signed:

Signed

Wayne Apsey Lauren McGinley
General Chairperson

Assistant Director Labour Relations

October 12, 2021

Hearing: Toronto, November 17, 2021. In person and video conference.

APPEARING FOR THE COMPANY:

Lauren McGinley, Assistant Director Labour Relations
Elliot Allen, Manager, Labour Relations

APPEARING FOR THE UNION:

Ken Stuebing, Counsel, CaleyWray
Wayne Apsey, General Chairman
Brent Baxter, Vice General Chairman
Maclean Campbell, Grievor

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 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. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

ANALYSIS AND DECISION

[2] The Company maintains that culpability was established during the fair and impartial investigation and does not appear to be in dispute by the Union throughout the grievance procedure. With respect to the assessment of dismissal, the Company maintains:

- a) Canadian Pacific relies on an Honor System for TCRC represented employees to enterclaims. Familiarization (“FM”) claims are auto-paid and may or may not be subsequently subject to audit. Clearly, the Company places a high level of trust on employees who entertheir time in this manner and consequences for breach of this trust must be equally high.
- b) The Grievor’s culpability was established through the fair and impartial investigation and does not appear to be in dispute by the Union.
- c) Discipline was determined following a review of all pertinent factors, including those the Union describe as mitigating. The Company maintains the discipline was warranted and an appropriate quantum of discipline was assessed given the significance of the infractionas well as in consideration of the Grievor’s disciplinary history.
- d) The Company also objects to the Union’s vague and unspecific request for the Grievor to be “made whole” and the Union’s stated desire to reserve the right

to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

[3] On December 12, 2019, the Grievor was required to attend an investigation in connection with:

“Your Time Claims Submitted while RCLS Training between the dates of November 25th to November 28th, 2019.”

[4] At the investigation Road Foreman D. Monk gave evidence that he claimed was correct and accurate. His memo of December 6, 2019 was evidence at the investigation providing:

Memo to File:

Maclean Campbell

Friday December 6th, 2019

On **Tuesday December 5th, 2019** it was brought to my attention that Maclean Campbell was allegedly qualified on RCLS. After checking in CMA Maclean had a P3 qualification added. I contacted the CMC dispatcher Kathleen Orellana and asked why she had put the qualifications and stated that Maclean had called in the previous day and changed his rest and notified her that he was now RCLS qualified and had asked for a P3 to be put beside his name. I then requested the tapes be pulled of this conversation. On Friday November 29th, 2019 Maclean was scheduled to be ridden with and qualified at 19:00 on TT14 at which point he called in prior to work and booked off sick at 17:29. Trainmaster Duncan Simpson was at the Pull down awaiting Maclean to show up which he never did. Upon talking with the crew they stated that Maclean had not shown up the previous day as well.

On December 5th upon further investigation Maclean Campbell entered FM claims for the following dates. November 25th, 26th, 27th, and 28th, 2019. After speaking with Conductor Michael Gentles on Friday December 6 2019 he confirmed that Maclean had never showed up to work with himself and Shawn Lawson on November 25th, 2019 and on November 28th with himself and Conductor Mona Sansoya. On Thursday December 5th, 2019 I Contacted Conductor Philippe Ouellete and he confirmed Maclean Campbell only showed up for 1 of 2 shifts he had worked with Shawn Lawson between November 26th, and 27th, 2019.

Maclean had been scheduled to work the assignment TT14 by Trainmaster Aaron Twomey for the week of November 25th-29th 2019 to complete his training. Maclean allegedly only showed up for one shift the entire week and entered claims in for these days of \$307.31. **Emphasis Added**

Daryl Monk
Road Foreman Toronto

[5] The Company argued that during the week of November 25 – 29, 2019, the Grievor was scheduled to attend on the job training in Remote Control Locomotive Service (“RCLS”) with a qualification trip scheduled with a Company Officer on November 29, 2019. However, the Grievor called in sick for November 29, 2019 and as such, the qualification trip did not occur as planned.

[6] The Company submitted that on Tuesday, December 5, 2019, Road Foreman Daryl Monk noted that a P3 qualification (RCLS qualified) had been added beside the Grievor’s name in the Crew Management Application. Believing this to be an error, Mr. Monk contacted the Crew Management Center (“CMC”) to determine how this had occurred and to have it corrected.

[7] Mr. Monk determined from conversations that the Grievor had called into the CMC and notified them that he was now RCLS qualified. This prompted Mr. Monk to look into the situation further to determine if the Grievor had somehow been qualified unbeknownst to him and what all had occurred the week of November 25 – 29, 2019. Upon further investigation, it was determined that the Grievor had submitted FM claims of \$307.31 per day into CMA for November 25 to 28, 2019. The Grievor’s scheduled coach for November 25th and 28th, Conductor Michael Gentles, advised that the Grievor did not attend work on either date. Further, his scheduled coach for November 26th and 27th, Conductor Philippe Ouellete, confirmed that the Grievor only showed up for 1 of 2 shifts.

[8] The Company maintained that a Notice of Investigation was issued December 9, 2019 and a fair and impartial investigation was conducted on December 12, 2019. Subsequently, the Company determined that culpability had been established through the investigation and the Grievor was dismissed on January 6, 2020. CP argues that following the issuance of the Notice of Investigation, the Grievor submitted a time claim adjustment for his November 28 FM claim, having it removed.

[9] The Company submitted that all Train & Engine employees work under the Honour System which provides as follows:

The Honour System

Under the Honour System all Train & Engine Employees are responsible for their own payroll.

Most timeslips are automatically approved and paid, and are subject to audit at a later date by Audit Specialists. As your own timekeeper, **you are responsible** for your timeslips (even if submitted by a fellow employee), and you must make every effort to understand and apply your Collective Agreement, this Manual and instructions provided by the Company from time to time. With CMA (Crew Management Application), you make your own adjustments (see “Adjusting Timeslips”).

You are your own timekeeper.

[10] The Company referred me to railway authorities in CROA 2280, 3614, 4198, 4767, 4438, 4445, 730, 473, 5461, 478, 730, 899, 1472, 1474, SHP 311, 461, 478, 730, 899, 1472 and 1474. The Union relied on railway authorities in CROA 3409, 4621 and Ad Hoc 723.

[11] The Union submitted that the Company should only be able to put forward what was contained in the Company’s Step 2 grievance response. The Union did not receive an actual

division grievance response until just days before the hearing. It submitted that the Company had sent the Division a grievance response which had nothing to do with this case.

[12] The Union objected to improper expansion of the record. The Company had submitted the Grievor's employee safety reports, train accident and incidents report as well as rides evaluations. It argued that none of this had ever been part of any aspect of the investigation process.

[13] The Union objected to the use of Road Foreman Monk's memo of December 6, 2019 as it was largely based on hearsay and included errors in dates repeated in the investigation.

[14] In reviewing Mr. Monk's memo, it is dated Friday, December 6th, 2019. He then states that information was brought to his attention on Tuesday, December 5th, 2019. However, December 5th, 2019 was a Thursday not a Tuesday. The Company maintains that the evidence established that the Grievor did not show up on November 25, 2019, a fact established by Mr. Monks' evidence at the investigation stating:

Q22: Mr. Monk when you interview Mr. Mike Gentles did he advise you that Mr. Campbell didn't attend his training shift on November 25th?

A22: Monday Nov 26 Mr. Campbell never showed up, Tuesday & Wednesday Mr. Gentles was off on H&S and Thursday Nov 28. Mr. Campbell never showed up. **Emphasis Added**

[15] Monday was November 25th not the 26th as stated above by Mr. Monk. The Union argued that the Grievor's claim of attending work on Monday November 25 was not challenged or pursued by the Company during the investigation. The Union argues that the Company has the onus of proof on the balance of probabilities and has not proven that he did not attend work on the 25th. The Company argued that the Grievor's testimony lacked all credibility and was contrary to the reports of Conductors Gentles and Ouelette to Mr. Monk.

[16] Given that the memo from Mr. Monk was gathered information from others which included errors in dates and was placed a number of days later, I have difficulty with the findings relating to November 25th, a day the Grievor claims he was working. The Union Counsel objected to the use of Road Foreman Monk's memo as it was based on hearsay and clearly not factual.

[17] I take notice that the parties use investigations as the foundation for assessing discipline. A long standing system known to be in place for over 50 years at the Canadian Railway Office of Arbitration. Investigations are largely triggered by accident and incident reports. Accordingly, the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence are often adduced without objection. However, in this case, there is concern for cogency and accuracy in regards to the reliability of Mr. Monk's memo.

[18] Admitting hearsay evidence may be appropriate to balance various issues including the factual context and procedural fairness. In this case, I agree with Union Counsel that it would be a serious error to rely too heavily on the information flowing from Mr. Monk. However, I also believe it would be a mistake not to consider the Grievor's own admissions in response to such evidence.

[19] In this case, the Grievor did not deny all of the things alleged. He did not say that all statements were untrue. He admitted to adjusting his time claims after it was brought to his attention. He admitted claiming November 27 when he was not there. He admitted that he was

scheduled to work with a supervisor on November 29th and he made no effort to contact him with the fact that he would not be there. He sought to modify his claims and said that one claim was a mistake. Therefore, the entire basis of the investigation is not hearsay evidence.

[20] I am asked to determine if the employer had just cause to terminate the Grievor. The Union maintains that Mr. Campbell made a mistake in regards to his entry on the 27th. The Union argues there is no proof of any ill intent on the Grievor's part anywhere, notwithstanding the Company's aspersions throughout the process.

[21] The Union argues that Mr. Campbell submitted a claim on December 3rd, for 4 days. He worked the 25th and 26th, and did not work the 27th or 28th. He cancelled his claim for the 28th and unfortunately should have also cancelled the 27th. His mistake is limited to the latter two days. The Union argues that outright dismissal is an excessive response in these circumstances.

[22] The investigation and discipline were clearly stated to be in regard to time claims. However, Road Foreman Monk's memo triggering the investigation alleged two issues. The first issue being the concern that the Grievor had improperly declared himself qualified in Remote Control Locomotive Service (RCLS). The second issue was the claim that the Grievor submitted time claims for days not worked. Mr. Monk claimed that when speaking with other employees, the Grievor had only showed up for one shift the entire week of his training.

[23] While the investigation was focused on time claims, the questioning pursued questions regarding whether the Grievor had improperly declared himself qualified beginning at Q&A 12 and concluding at Q&A 28. At Q&A 26, the Grievor noted that he was not aware that sign off on his qualifications was required as he had previously taken many calls for RCLS assignment. The Grievor was asked:

Q26: What Manager Signed off on your Qualifications?

A26: I didn't know I required a manager to sign off on my training. I have work RCLS Assignment Previously for some year taking many calls.

[24] Once the Grievor indicated that he had taken many RCLS calls, the issue was not pursued. However, I find the Grievor's position that he did not know his training would require sign off not credible. He knew he was to meet with Trainmaster Duncan Simpson on Friday, December 29th, and did not bother to let him know he would not be at work.

[25] What was specifically centred over training sign off, then focused only on time claims. The Grievor was asked about two specific dates, the 28th and the 25th. The Grievor answered:

A 16: The 28th I have adjusted and removed, the 25th I was here.

[26] The Grievor's claim that he worked on the 25th was not challenged. Mr. Monk had gathered his information from others and what was put into his memo was clearly inaccurate at best. However, on January 6, 2020, the Grievor was advised that he was dismissed by Superintendent Derek Harter regarding:

"Your Time Claims Submitted while RCLS Training between the dates of November 25th to November 28th, 2019."

[27] In the Company's book of documents, CP provided a letter dated April 23, 2020 from Superintendent Harter in response to the Union's Step 1 grievance. The Union objected to the letter

claiming it had never been received. In the first two paragraphs of the letter, Mr. Harter states to TCRC Local Chairman Paul Barker:

This is in response to your step one grievance filed on behalf of Mr. Maclean Campbell on February 24, 2020 with respect to the assessment of Dismissal for Submitting False Claims.

After reviewing your grievance, I disagree. Mr. Campbell throughout the investigation admitted to be in violation the policy. The matter of booking sick for an assignment in an attempt to obtain time off.

Emphasis Added

[28] To be clear, booking sick to obtain leave was not previously mentioned in this grievance. His response was clearly a cut and paste recycling of his previous Step 1 response involving booking sick to obtain leave on April 6, 2020, which was the topic of a previous assessment in which I oversaw. In the two pages that followed Mr. Harter's letter, he provided a cut and paste of Q&A 15 to 24 from the time claim investigation of the submission of false time claims, which was the real subject of the matter.

[29] At the same time that I was writing this decision, I also had an assessment of a 30 demerit grievance for the same Grievor regarding booking sick to obtain leave. Mr. Harter was the responding officer for Step 1 of that grievance. On April 6, 2020 he stated to Local Chairman Paul Barker:

This is in response to your step one grievance filed on behalf of Mr. Maclean Campbell on February 10, 2020 with respect to the assessment of thirty (30) demerits for his violation of the T&E availability standards operating bulletin.

After reviewing your grievance, I disagree. Mr. Campbell throughout the investigation admitted to be in violation the policy. The matter of booking sick for an assignment in an attempt to obtain time off.

Emphasis Added

[30] In the page that followed, Mr. Harter again went on to provide a cut and paste of Q&A 17 through 22 of that investigation. Mr. Monk and Mr. Harter's involvement in the assessment of discipline give rise to the credibility of the process.

[31] The Company maintains that Mr. Monk has no reason to make the claims he did in his memo. It asks that I be specifically drawn to the comments of Arbitrator Moreau in CROA 4735 wherein he stated:

“Similar to the conclusion reached by Arbitrator Silverman in CROA&DR 4445, I find the grievor's version of events to be lacking in credibility. In order to accept the grievor's account, I would have to reject the version of events provided by the Company's witnesses who had nothing to gain by reporting the incident. I find the evidence of Mr. Morin-Algure, who was first on the scene, to be a straightforward account of his observations. His testimony was steadfast in the arbitration proceedings and he did not vary his account of the events in any substantial way from his statement. Further, there is no indication that he was motivated for any reason to target the grievor or fabricate his testimony. I

therefore reach the same conclusion in that regard as Arbitrator Silverman in CROA&DR 4445:

If I were to accept that version of events, I would have to find that Trainmaster Bruno essentially fabricated details of what occurred in order to implicate the Grievor and no evidence before me suggests any reason why that would have occurred.

[32] Unlike CROA 4735, this case is about initial information sought out from others and placed in a memo days later. The memo and Mr. Monk's responses to questions at the investigation are clearly mistaken at best. His memo contained wrong dates. His answers during the investigation provided wrong dates.

[33] Mr. Harter clearly engaged in a cut and paste response to a dismissal grievance. He clearly did not conduct a meaningful review of the issues raised by the Union at Step 1, or provide an even cursory review of the investigation or the material he pasted into his letter. His response at Step 1 was clearly not given the level of attention that the Company is asking of the Grievor regarding his attention to the time claims he submitted for payment.

[34] I do not wish to complete these reasons without commenting in obiter on what I see as major contributing factor in my findings and the outcome of this dispute. The parties have agreed to an effort aimed at cleaning up a back log of grievances between with hearings from October 2021 to April 2022. The parties have agreed to utilize Ad Hoc arbitration in addition to regularly scheduled cases before the Canadian Railway Office of Arbitration. The parties brought 27 cases before me in October and November. Four of the cases were on behalf of Conductor Maclean Campbell, the Grievor in this case. By the time I provide this decision he will have been under appeal of dismissal for two years.

[35] The often stated presumption in labour relations is that the prompt resolution of grievances in the work place is what the grievance and arbitration procedures in collective agreements are designed to effect. Grievances which are allowed to sit, as in this case for over two years do nothing for labour peace, good working conditions or the absolute need for a joint focus on safety.

[36] I believe a number of issues stand out based on the evidence in these first 20 case and the recent railway case law submitted to me. First, is that the grievance and arbitration procedure between these parties under their current collective agreement is in a state of near collapse. Both parties have clearly contributed to the problem.

[37] An effective grievance process requires that the Union to clearly state at the earliest opportunity the grounds for a grievance, in order to permit the Company to respond on an informed basis. The Union argues that most cases flow from investigations of incidents involving their members. The Union says that the representatives who represent their members at those investigations encourage their members to be forthright and accountable only to be assessed excessive or even unwarranted discipline.

[38] The Union says members are often targeted for discipline. Facts are distorted in reporting incidents and the investigation process is often unfair, as in this case. I find it unfortunate that it is often only in preparation for arbitration that the full extent of procedural irregularities are exposed. As in this case, front line managers are criticized for fabrication of facts and errors.

[39] I find that front line operations managers appear stretched trying to reduce the complexity of investigations and complete them in a short period of time. Grievances are often not responded to by those who should provide proper oversight of the investigation. While not responding is contemplated in the grievance provisions, it adds to the delay in moving the grievance to the next step of the process. When a grievance receives a response at Step 1, it can reach the point, as in this case of actually undermining the credibility of all involved in the investigation, assessment of discipline and representation at arbitration hearings.

[40] I accept that in some circumstances, Company operations officers may find it more important to deal with operational issues than collective agreement grievance responses. A solution must be found to properly process the grievances for which a responsibility exists under the collective agreement. The clear intent of this collective agreement is that a grievance is to be progressed by officers who have increased levels of authority. It is necessary for these parties to acknowledge that it is a matter of a serious concern to labour relations.

[41] All that said however, I cannot overlook the Grievor's discipline record. The Grievor is employed in a safety critical position. His recent record indicates that he has repeatedly approached his responsibility with a casual disregard for the need to focus and give attention to detail. The incidents on record are in regard to his availability to protect his assigned work responsibilities as well as observe fundamental safety rules. It is clear from the evidence in this case and his record, that the bond of trust necessary between the Grievor and management in the railway workplace has dissipated significantly.

[42] The Grievor only acknowledged adjusting his time claims after irregularities were brought to his attention. He maintains that the one day he did claim when he was not present was a mistake. In my opinion, his actions were consistent with his ongoing lack of appreciation for the need to focus and attention to detail in all aspects of his job. Had it not been for the clear errors and irregularities in the investigation, the lack of persistence during the investigation, and the failure of Mr. Harter to properly engage in the grievance process, I may well have upheld the termination.

[43] The Grievor has been advised that his job is in jeopardy. It may still be if he does not return to clearly focus on his job as his record shows he was once capable.

[44] In view of all of the foregoing, the Grievor is reinstated without compensation or loss of seniority.

I remain seized should there be any dispute with respect to any aspect of the interpretation, enforcement or implementation of this award.

Dated this, 20th, day of December, 2021.



Tom Hodges

Arbitrator