

IN THE MATTER OF AN AD HOC ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And
CANADIAN PACIFIC RAILWAY COMPANY (CP)

AH: 750

DISPUTE:

Appeal of the dismissal of Conductor Dylan Radford.

JOINT STATEMENT OF ISSUE:

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

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

“Your alleged violation of T&E Availability Standard Information Bulletin Effective February 1st, 2017 and re-issued January 21, 2020, No-SI-003-20” for booking sick on June 9, 14 and sick after accepting a call on June 19, 2020 as well for your attendance history between January 1, 2019 – June 29, 2020.”

Formal investigation was conducted on July 2, 2020 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of the investigation, it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- T&E Availability Standard Information Bulletin Effective February 1st, 2017 and re- issued January 21, 2020, No-SI-003-20

In consideration of the decision stated above, please be advised that you have been dismissed from Company Service, effective July 15, 2020. Notwithstanding the above mentioned incident, based on your previous discipline history, this incident constitutes a culminating incident, warranting dismissal.”

UNION'S POSITION:

For all the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the Union position is that the dismissal of Mr. Radford was excessive and completely unwarranted as provided within our grievances.

The Union contends any discipline assessed in this matter is in violation of the Collective Agreement, the Canada Labour Code 239, 125, CROA 1588, Employment Equity, Policies 1300/1500, CROR General Rule A.

Mr. Radford had 3 sick book offs during the period to be investigated. The Company questioned the sick time which was outside of reasonableness and of the length of time post issue to the investigation.

The Union has listed many arguments/positions which we will not duplicate here but as noted in our grievances (and the 14 points made within) in respect to this file.

The Company's attendance policy is under separate grievance.

Mr. Radford followed the proper processes wherein being the judge of his own condition made the correct choice, and did not attend work so as not to jeopardize himself, his workmates, or the public, he adhered to General Rule A.

Mr. Radford sought help with EFAP and took the right and safe course, and is met with punitive discipline, he his outright dismissed from service. A dismissal which obviously affects and punitively punishes the employee, and their family.

There are laws protecting employees who are sick, and when it comes to being unfit, the Company's past EVP Peter Edwards made it very clear: "They're entitled to do so under each of the collective agreements, and **it's a right that we defend,**" he said. "It's a right that is exercised several thousand times a year by employees." (emphasis added) AND

"CP Rail insists that it follows the principles of modern fatigue science, and that its crews have the "unfettered right to choose not to work if they're tired," **without fear of being disciplined.**" (emphasis added)

Mr. Radford throughout the investigation defended his reasons for not attending work.

The Company did not respond to the Union's Step 2 grievance within the time limits outlined in Article 40.02. The delivery of a non-response, in the Union's view is in violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA. The Union reserves its' rights to object and respond to any new positions presented by the Company.

The Union requests that the dismissal of Conductor Radford be expunged, and he be returned to work forthwith, 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 after the fair and impartial investigation in the matter, the Grievor's culpability was clearly established. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors. As such, the Company maintains dismissal was just and an appropriate assessment given the circumstances. Further, the Company maintains the dismissal was a culminating incident warranting his dismissal after progressive discipline was applied, providing the Grievor several opportunities to correct his behavior.

Without precedent or prejudice to the aforementioned position, the Company reserves the right to object 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.

Failure to specifically reference any argument or to take exception to any statement presented as “fact” does not constitute acquiescence to the contents thereof. The Company rejects the Union’s arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

The Union contends the Company has failed to respond to the final grievance within the time limits of Article 40.02 and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of this matter to arbitration, it is clear the Union acknowledges Article 40.04 and has progressed to the next step of the 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
General Chairperson
CTY- CP East TCRC

Lauren McGinley
Assistant Director Labour Relations

October 12, 2021

Heard on 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
Dylan Radford, 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*.

BACKGROUND

[2] The Grievor joined the Company on April 28, 2014. He started as a Trainperson Trainee and began working as a Conductor on April 26, 2016.

[3] On June 29, 2020, the Grievor was given notice of investigation to be held July 2, 2020. On July 15, 2020, the Grievor was dismissed from Company Service effective July 14, 2020. His dismissal was in connection with his “alleged violation of T&E Availability Standard Information Bulletin Effective February 1st, 2017 and re-issued January 21st, 2020, NO-SI-003-20” for booking sick on June 9, 14 and sick after accepting a call on June 19, 2020 as well for your attendance history between January 1, 2019 - June 29, 2020.”

[4] Prior to the Grievor’s dismissal, the Grievor had been assessed with a 30-day deferred suspension and given a last chance warning. The Company’s records of his most recent discipline record indicated:

Date	Discipline Assessed	Issue
February 27, 2020	March 24, 2020	30 Day Deferred Suspension, last chance warning and Meeting with Superintendent for booking unfit on call on February 27, 2020.
October 5, 2019	November 18, 2019	15 day suspension for booking unfit on call on the date of October 5th, 2019. Through an investigation it was proven that he had 12.5 hours rest.
August 19, 2019	September 9, 2019	20 Demerits for booking unfit on call the date of August 19th, 2019.
June 2, 2019	June 19, 2019	15 demerits for booking unfit on the date of June 2, 2019 into vacation.
February 6, 7, 8 and 25, 2019	June 17, 2019	Formal Reprimand for booking sick on the dates of February 6th, 7th, 8th and 25th, 2019.
January 6 and 15, 2018	November 16, 2018	5 Day Record Suspension for booking sick on January 6 and 15, 2018 by not sending satisfactory medical information to OHS for review.

[5] The Company submitted that since June 2, 2019, the Grievor had booked sick into vacation three times. On June 2, 2019, he booked Unfit On Call at 08:34 then booked back on at 23:24 to start Annual Vacation at 23:59. He repeated it again on October 5, 2019 when he booked Unfit On Call at 09:15 then booked on at 16:02 and then into Annual Vacation October 6 at 08:00. In the

last 18 months his work record reflected the following:

2019

Bookoff Type	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Sick	0	2	1	0	1	0	0	1	0	0	1	0	6
Sick On Call	0	0	0	0	0	0	0	0	0	0	0	0	0
Unfit	2	0	1	1	0	0	1	0	1	1	1	0	8
Unfit On Call	0	0	0	0	0	1	0	1	0	1	0	0	3
Total	2	2	2	1	1	1	1	2	1	2	2	0	17
Times On Call	0	0	0	0	0	1	0	1	0	1	0	0	3

2020

Bookoff Type	Jan	Feb	Mar	Apr	May	Jun	Total
Sick	1	0	0	0	0	2	3
Sick On Call	0	0	0	0	0	0	0
Unfit	1	0	1	1	0	1	4
Unfit On Call	0	2	0	0	0	0	2
Total	2	2	1	1	0	3	9
Times On Call	0	2	0	0	0	0	2

ANALYSIS AND DECISION

[6] I now turn to the issue of whether discharge is appropriate given the facts of this dispute. As noted above, the Grievor has an extensive discipline record regarding attendance issues. In March of 2020, he had been given a last chance warning.

[7] During the investigation of July 2, 2020, the Grievor advised the investigating officer twice that he would be seeking help from the Company's Employee and Family Assistance Program (EFAP). The investigation noted:

Q43: Referring to Appendix C, your records indicate in the calendar year for 2019 you had a total of 6 sick days, 8 unfit days and 3 unfit days on call totaling 17 days off, is that correct?

A43: I did not recall until I looked at the Appendix. I also had a lot of family issues going on as I discussed with Dave Purdon, the passing of my grandfather and most of the unfit days are due to that.

Q44: Did you seek assistance and ask for support from the EFAP?

A45: No I did not.

Q46: Are you aware that there is a program to assist you in personal matters?

A46: Yes I am aware and am going to be contacting later today to discuss personal matters going on in my life right now.

Q57: Do you have anything additional you wish to add to this statement?

A57: My private life is in turmoil. I understand my attendance has not

been the greatest and I will seeking EFAP for assistance.

[8] There was no evidence that the Company followed up with the Grievor regarding his consultation with EFAP. The fact that the Grievor had consulted with EFAP and a brief overview of the information regarding his personal life was raised in the grievance process by the Union. The Company did not respond to the issues raised with EFAP by the Grievor. The Company objected to the introduction of a summary of the Grievor's personal issues provided by EFAP.

[9] While the Company strongly objected to the introduction of the EFAP document evidence, I found it material in these circumstances that the Grievor contacted the Company's EFAP program. The Company was aware of his concern for his personal problems rendering him unfit for work. The Company chose not to address the issue of his personal problems at the time or respond during the grievance process. The Union argues that the Grievor is now healthy to return to work without restrictions.

[10] After reviewing the information in the EFAP report, I understand the Grievor's concerns relating to his privacy and others involved. It is sufficient to say that for many, the issue the Grievor faced can be among the most difficult to face as a father. I have no doubt that it can effect a person's ability to focus on the task at hand in a safety sensitive workplace. I agree with the Grievor's efforts to ensure that the disclosure of this information be minimized.

[11] I also appreciate the Company's concern for ensuring that an Employee in a safety sensitive railway position is meeting his work responsibility and is fit for work. The Company is conscious of the need to minimize the disclosure of medical information where possible. The Company's Information Bulletin regarding T&E Availability Standard advises employees:

If you find that personal problems are having a negative impact on your life, help is available through Shepell, your Employee and Family Assistance Program (EFAP). Shepell can be reached by calling 1-800-XXX-XXXX.

[12] In this case, the Company's reasonable concerns could have been addressed by taking a step-by-step approach that included EFAP involvement. The Company chose to dismiss the Grievor knowing that he was approaching EFAP. It also chose not to respond when the EFAP involvement was raised in the grievance process.

[13] The personal problems of the Grievor occurred in a narrower period of five weeks culminating on July 3, 2020, the day after the investigation. The time under investigation was a much larger period.

[14] During the investigation the Grievor gave various contradictory reasons in response to questions regarding his absence. At one point during the investigation, the Grievor stated that he had to take care of children while his fiancé was working. This was at a time when the Grievor said he was sick.

[15] The Grievor also requested Earned Days Off (EDO) on June 17, 2020 for a family reunion on the weekend of June 20/21, 2020 which was denied. The Grievor then booked sick from June 19 to June 21, 2020, the time the family reunion was scheduled and his vacation was starting. The Grievor once again did not justify this absence with other personal circumstances nor did he seek medical attention.

[16] After reviewing the evidence from the investigation, I agree with the Company that in the 18 months leading to the Grievor's dismissal he demonstrated a clear pattern where the Grievor

called in sick or unfit just before he was scheduled to go on vacation and thereby extending his vacation.

[17] The number of times that the Grievor booked Unfit On Call is also a concern in my opinion. Booking Unfit On Call can have a significant operational impact on the Company. It also impacts the Grievor's fellow crew members who were expecting him to report for work. It delays departures and impacts the on duty times of the fellow employees.

[18] I find that discipline was warranted. Given the Grievor's past discipline record and the fact that he had been given a last chance warning signifies that discipline was warranted. Absent the unchallenged evidence from the Company's EFAP provider, the dismissal of the Grievor may have been upheld. However, the Grievor's personal problems were a factor for a five week period before the investigation.

[19] The Company had the opportunity to explore the timelines of his problems as they impacted his attendance. There is no evidence that the Company gave the Grievor's personal problems any consideration when they were raised at the investigation or during the grievance process. I find this is an appropriate case to exercise my discretion and reduce the discipline assessed.

[20] In view of all of the foregoing, the Grievor is to be reinstated without compensation and without 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