IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANA

DA RAIL CONFERENCE (TCRC)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

AH: 751

Dispute:

The issue in dispute is the assessment of twenty (20) demerits to Locomotive Engineer J. Johnston of London, Ontario.

Joint Statement:

Following a formal investigation Mr. Johnston was issued a form 104 stating; *"Please be advised that you have been assessed with twenty (20) Demerits for booking sick on October 11, 2019 and on December 23, 2019; thereby, violating the contractual obligation in accordance with the Operating Bulletin No. SI-064-18 T & E Availability Standard."*

Union Position:

The Union contends the discipline is unwarranted in the circumstance.

The Company replied to the Step 2 via GMS in violation of Arbitrator Weatherill's Award and in violation of the CCA Article 40, Letter: Management of Grievances & The Scheduling of Cases at CROA.

The first instance referenced in the investigation is when Mr. Johnston booked sick on October 11, 2019. He claims he was sick and there was no request made of him to provide a Doctor's note to corroborate his time off. Although much to the chagrin of the Superintendent, Section 239 of the Canadian Labour Code has applicability and is not simply a "get out of jail free" card as flippantly remarked in the step one response. This instance ought to be dismissed.

With respect to the reference to the December 23, 2019 absence, the Union contends that Mr. Johnston asked Assistant Superintendent Johnson for leave on December 3, 2019. Twenty days in advance of the day requested. This request was dismissed simply stating "We currently aren't giving any additional time off." The Union contends that leaves are contemplated in Article 31 of the Collective Agreement and ought to be considered. The instant dismissal of his request is even

in contravention to the very bulletin the Company relies on to discipline Mr. Johnston, wherein it identifies pre-authorized personal leave as a legal means that will not result in discipline.

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union seeks to have the discipline assessed Locomotive Engineer Johnston expunged and that he be made whole for all wages and benefits lost for attending the statement. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

Company Position:

The Company disagrees and denies the Union's request.

The Company maintains during a fair and impartial investigation that the grievor was found culpable of violating his contractual obligation in accordance with the Operating Bulletin No. SI-064-18 T&E Availability Standard.

The Company maintains the discipline assessed was in line with the Hybrid Discipline & Accountability Guidelines.

Discipline was determined following a review of all pertinent factors, including all mitigating and aggravating factors.

For all the reasons brought forth through the grievance process, the Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

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:

Ed Mogus

General Chairperson, LE East

FOR THE COMPANY:

Don McGrath

Manager Labour Relations, CP

October 19, 2021

Hearing November 17, 2021. In person and by videoconference.

APEARING FOR THE UNION:
Ken Stuebing – Counsel, Caley Wray
Ed Mogus - General Chairperson LE East
Joe Bishop - Sr. Vice General Chairperson LE East
Jeffrey Johnston - Grievor

APEARING FOR THE COMPANY:
Lauren McGinley, Assistant Director Labour Relations
Elliot Allen, Manager, Labour Relations

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 was required to attend an investigation on January 14, 2020. He was advised that the investigation was in connection with:

> Your work history from October 9, 2019 to January 6, 2020.

[3] As a result of the investigation the Grievor was advised on January 20, 2020:

> Please be advised that you have been assessed with twenty (20) Demerits for booking sick on October 11, 2019 and on December 23, 2019; thereby, violating the contractual obligation in accordance with the Operating Bulletin No. Sl-064-18 T&E Availability Standard.

[4] The Grievor commenced his employment with CP in January 2003. He had 17 years of service at CP at the time of the discipline being assessed.

ANALYSIS AND DECISION

[5] On March 4, 2020, the Union filed a Step One Grievance challenging the quantum of the discipline and noted at the outset:

> It is the view of Union that the quantum of discipline accessed to Mr. Johnston is unwarranted. Mr. Johnston is a good employee, with little to no operational, safety or attendance issues on his record.

[6] On March 26, 2020, the Company responded to the Union's initial comments:

> Firstly, Mr. Johnston is not a good employee with little to no operational, safety or attendance issues, this seems to be your standard opening, perhaps research the employee prior to making this statement. He has been disciplined 13 times since 2003 and multiple for absenteeism.

[7] In my opinion, the Grievor's discipline record is extensive. The Grievor began service with the Company in 2002 and was first cautioned for running through a switch in 2003. In 2005, he began a series of attendance related disciplines. Most significant are booking sick after accepting a call in 2007 and booking sick prior to a day off in 2012. The Grievor was also suspended for improper and excessive monetary guarantee claims in 2016. His attendance issues are consistent and repeatedly brought to his attention.

[8] The investigation dealt with two specific and unrelated absences.

- Booking sick on October 11, 2019
- Booking sick on December 23, 2019

[9] The Union argued that the Company waited three months to convene a formal investigation in connection with the Grievor being sick on October 11, 2019. It argues that the delay is prejudicial to the Grievor and contrary to arbitral standards of timely intervention in attendance-related matters.

[10] At the investigation of January 14, 2019, the Union objected to the lack of timeliness regarding the October 11, 2019 incident. After reviewing the investigation, I cannot find that wrongdoing by the Grievor for that issue was established.

[11] I now turn to the incident of December 23, 2019 and the quantum of discipline assessed.

[12] The Company reviewed the Grievor's discipline record and maintains that it is less than enviable to have been assessed 100 demerits, 4 reprimands and 15 days of recorded suspension throughout his career. Notably, the Grievor has previously been disciplined on eight separate occasions for habitual attendance and absenteeism violations, including one just 4 months prior.

[13] The Company maintains that the Grievor's culpability in the second matter was clearly established. It was determined that the Grievor improperly booked unfit/sick on December 23, 2019 and in doing so, he intentionally took additional time which he wasn't eligible for despite being advised that extra leave would be unavailable for the time he requested.

[14] Based on the Grievor's discipline history, the Company argued that the Grievor was well versed with the Company's Availability Standard, his contractual employment obligations, as well as the expectation of the Company regarding employees to duty to report for work.

[15] The Union maintains that the Collective Agreement (Article 31.02(3) contemplates 72 hours' notice for a requested leave for EDO's inside of window and the ability to schedule outside of window with arrangements with local management. Mr. Johnston's 20 days' notice was more than six times the minimum notice contemplated by the parties. It argues that the instant dismissal

of his request is even in contravention to the very bulletin the Company relies on to discipline Mr. Johnston.

[16] The Union argues that the Company ought to have granted Mr. Johnston's timely and reasonable request. Instead, Mr. Johnston's reasonable and timely request was dismissed with Assistant Superintendent Neil Johnson simply stating, "We currently aren't giving any additional time off." The Company has not stated any particular operational reason for its inability to accommodate one employee's advance request to be off for one day.

[17] During the investigation, the Grievor addressed the facts relating to his absence on December 23, 2019:

> Q12: On Monday December 23rd at 5:11 you received a call for assignment TH11 is this correct?
> A12: Yes
>
> Q13: As per Appendix 'A' you booked off unfit as saying you were not in Canada is this correct?
> A13: I was in bed in Jamaica and I said book me sick, book me unfit, do whatever you need to do as I will not be making it 4000 miles in 4 hours. I was trying to be proactive with getting that day off so it would not be a situation
>
> Q15: What were your Annual Vacation start and end dates for the month of December?
> A15: Start date was the 16th and the end date was 22nd. And I have booked extended rest till 04:00 of the 23rd
>
> Q16: What dates did you book your trip for?
> A16: I booked it from Monday the 16th at 10:00 am to Monday the 23rd at 17:00 departure, with an original flight departure of noon but it was late.
>
> Q17: Knowing what your annual Vacation dates were why did you purposely book outside the given dates eligible?
> A17: Because I wanted to make sure I booked my trip while I was on holidays on the Monday the 16th. The return date was beyond my control as I was at a mercy of an airline.

[18] In my opinion, it is not uncommon for employees in the railway industry to be unable to have vacation from December 23 to January 2 due to insufficient seniority. Employees may also request EDO time off in order to extend their time off. Given the nature of the railway business, managers are cautious to grant added time off.

[19] In this case, the Grievor booked his vacation knowing he was due to work December 23 and would not be available. His request for an extra day off was denied. He claims he was at the mercy of an airline. I have difficulty with his explanation.

[20] The Grievor is a long service employee who has an extensive discipline record. He is employed in a safety sensitive position which requires a higher standard of accountability and forthrightness. His discipline record reflects an ongoing inability to take his obligations seriously.

[21] The Union suggests it is unreasonable to assume that by allowing the Grievor to extend his vacation by one day that railway operation would be negatively impacted.

[22] The Company submitted that the Grievor selected a vacation package that did not line up with his vacationallotment even though he was not given authorization to extend his allotment. The Grievor had a duty to work on December 23rd. The Company did not have a responsibility to schedule his vacation allotment around a vacation provider's packages.

[23] The Company pointed me to the comments of Arbitrator Picher in CROA&DR 3981 which I find of significant value in this case:

> The discipline in the instant case was not issued by reason of the grievor's absence, nor did the Company question the legitimacy of his illness. Rather, the discipline assessed is for the fact that the grievor did, contrary to long standing policy, await the moment of an actual call to work before advising the Company that he would not attend at work because of illness. That rule, which is of long standing, is plainly intended to ensure that employees exercise a degree of vigilance and responsibility in giving their employer reasonable advance notice of their inability to attend at work by reason of illness. I am satisfied that that is not an unreasonable requirement in the railway industry which must operate on a 24 hour a day, 7 day a week basis, with many trains being required to operate at unscheduled and sometimes unpredictable times.

[24] The Grievor knew he would be expected to work on December 23, 2019. He took no action to ensure the Company would be properly aware that he did not intend to be available. The investigation into the incident was conducted fairly. I find the quantum of discipline assessed was reasonable given all the facts.

In view of all of the forgoing the grievance is denied.

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

Tom Hodges

Arbitrator