CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4631

Heard in Montreal, April 12, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal regarding the dismissal of Conductor B. Desjarlais of Kenora, ON.

THE UNIONS'S EXPARTE STATEMENT OF ISSUE:

In 2015 the Company unilaterally altered the administration of the Locomotive Engineer Extra Board (LEEB). Specifically, the Company began penalizing qualified Locomotive Engineers not working as such, with missed calls for said work while regularly assigned as Trainmen/Yardmen. Additionally, the Company amended the standardized calling procedures to call Locomotive Engineers not working as such prior to exhausting all other avenues of relief by set-up Locomotive Engineers.

Following an investigation Mr. Desjarlais was dismissed from Company service which was described as "For missing your call at 00:08 on February 6th, 2017 for train 113-03 as a Locomotive Engineer out of Winnipeg, MB, a violation of the Attendance Management Information Bulletin #MBN0-095-16; and as witnessed by your investigation on February 14th, 2017, in Winnipeg, MB."

The Union submits Mr. Desjarlais' regular position at the time of the alleged missed call was not scheduled for work as described above. As a result, the Union contends that the Company's actions are in violation of the Collective Agreements including CTY West Articles 76, and Auxiliary Board language from the 2007 MOS. The described actions also fail the appropriate tests required to institute company policy. In the alternative, the Company is estopped from making the described change.

The Union further contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations of a missed call, absenteeism, or any violation of the policies as referenced above. As a result, discipline assessed to Mr. Desjarlais is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident and being contrary to Company policy. It is also the Union's contention that the penalty assessed is contrary to the principles of progressive discipline.

The Union seeks a finding that the Company's actions have violated the provisions as outlined above, and an order that the Company cease and desist its ongoing breaches as described herein and within the Union's grievance(s).

The Union requests that the discipline be removed in its entirety, that Mr. Desjarlais be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Following a fair and impartial investigation, Mr. Desjarlais was dismissed from Company service "For missing your call at 00:08 on February 6th, 2017 for train 113-03 as a Locomotive Engineer out of Winnipeg, MB, a violation of the Attendance Management Information Bulletin #MBN0-095-16; and as witnessed by your investigation on February 14th, 2017, in Winnipeg, MB."

The establishment of culpability and the determination of discipline were made following a review of the investigation and all pertinent factors including the Grievor's service and discipline record. The Company maintains the discipline assessed was appropriate, warranted and just in all of the circumstances.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations of a missed call, absenteeism, or any violation of the policies as referenced above.

The Union requests that the discipline be removed in its entirety, that Mr. Desjarlais be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's allegations.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) C. Clark**
General Chairman	Assistant Director Labour Relations

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary
D. Guerin	– Senior Director, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
G. Edwards	– General Chairman, Calgary
H. Makoski	– Senior Vice General Chairman, Winnipeg
M. Wallace	– Local Chairman, Kenora
B. Desjarlais	– Grievor, Kenora

AWARD OF THE ARBITRATOR

Nature of the Case

1. On March 1, 2017, CP dismissed conductor Bryce Desjarlais for missing a call. The TCRC argued, *inter alia*, that the collective agreement already set out the only penalty for a conductor called under the Locomotive Engineer Extra Board (LEEB) process, but who did not answer a call.

2. CP argued that Mr. Desjarlais had an obligation to take that call and that dismissal was the appropriate penalty.

3. For the reasons which follow, the arbitrator has concluded that the collective agreement's wording distinguishes between employees who have volunteered under the LEEB process versus those who are not on the LEEB. In this case, those who are "not on the LEEB" have the same obligations for a call as they would for a call for their regular assignment.

4. However, given this is the first time the parties have debated the proper interpretation of the LEEB wording, as well as the existence of some confusion over procedure, the arbitrator finds only a written warning ought to have been issued.

5. As a result, Mr. Desjarlais will be reinstated in his employment.

Facts

6. Mr. Desjarlais worked as a conductor at CP. However, as is the case with many conductors, he had also qualified as a locomotive engineer (LE). The use of the term "Engineer Service Brakeman (ESB)" describes regularly assigned conductors who are also qualified LEs.

7. CP called Mr. Desjarlais to work as an LE for train 113-03 leaving on February 6, 2017 at 00:08 out of Winnipeg. Mr. Desjarlais did not answer the call. At the time of the incident, Mr. Desjarlais was working as a conductor in the conductor pool at Kenora, Ontario. Mr. Desjarlais had anticipated that he would be called to work as a conductor for train 420 at 0900 in the morning.

8. Mr. Desjarlais worked his following tour as a conductor.

9. CP held its investigation on February 14, 2017 and later terminated Mr. Desjarlais on March 1, 2017.

10. On the same day this Office held this hearing, it also heard a separate grievance concerning an earlier 30-day suspension for Mr. Desjarlais: TCRC&DR 4630. The arbitrator reduced that suspension from 30 to 3 days for a missed call.

11. Mr. Desjarlais' LEEB status is essential to an understanding of this grievance. At the time of the February 6, 2017 call, Mr. Desjarlais was not a volunteer on the LEEB.

He was instead an ESB who was called for an LE assignment. Item 6 of the 2007 MOA deals with this scenario.

Analysis and Decision

12. For the following reasons, the arbitrator concludes that Mr. Desjarlais had an obligation to take the call, since he had not volunteered to be on the LEEB when CP called him.

Principles of interpretation

13. A rights arbitrator cannot amend the collective agreement. Article 14 of the parties' Memorandum of Agreement Establishing the CROA&DR makes this explicit:

> The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

14. For interpretation cases, Arbitrator Moreau described the importance of evidence and the plain and ordinary meaning of negotiated provisions in CROA&DR 3601:

> Arbitrators follow several presumptive rules of interpretation when construing a collective agreement. One of the lead rules is that the provisions in a collective agreement must be read according to their plain and ordinary meaning. That rule will only be set aside when it has been demonstrated, with clear and reliable evidence, that the parties have agreed to an interpretation that is different from its ordinary meaning.

15. In CROA&DR 4606, this Office described how past practice and estoppel can impact collective agreement interpretations.

16. Given their expertise and experience in the railway industry, the parties' detailed comments on their negotiated collective agreement wording provide invaluable assistance to any arbitrator's interpretation exercise.

The negotiated LEEB wording

17. A previous article in the collective agreement, article 76.01, governed the LEEB regime. The parties amended the LEEB wording in Item 6 of their 2007 Memorandum of Settlement (2007 MOS). Item 6 of the 2007 MOS, which sets out 7 "conditions", forms part of the collective agreement.

18. The three relevant "conditions" in Item 6 in the 2007 MOS for Mr. Desjarlais' situation read as follows:

> A Locomotive Engineer Extra Board (LEEB) will be established for the calling of qualified Locomotive Engineers, who are not working as such, under the following conditions:
>
> 1. **Qualified employees not holding regular positions of Locomotive Engineer who desire to perform work on a single trip basis will indicate their desire to do so in writing** at each general advertisement of assignment or immediately when they are no longer able to hold the position of Locomotive Engineer. **They will be placed onto the LEEB, and they will take such work when called.**
>
> …
>
> 3. A qualified Locomotive Engineer who is first out on the LEEB and **not available for service when called will not be subject to a call as a Locomotive Engineer for 12 hours**.
>
> …
>
> 5. If the LEEB is exhausted and all other existing avenues of providing relief from the ranks of working Locomotive Engineers have also been exhausted, **qualified Locomotive Engineers not working as such and who are not on the LEEB will be called in inverse order of seniority**. In this instance, all miles earned by

> Trainpersons/Yardpersons working as an Engineer on a single trip basis will be added to the Trainperson's spare board miles for the purposes of regulating its size.
>
> (emphasis added)

19. The TCRC argued, *inter alia*, that ESBs have no obligation to take a call which comes from the LEEB process. Since there is no obligation, there accordingly cannot be any discipline for a missed call.

20. The TCRC described its position at paragraph 1 of its Brief (U-1):

> 5. The Grievance of Mr. Desjarlais is significant for a majority of the Union's membership. The unjustness of Mr. Desjarlais' dismissal for a missed call is before this Office, but it involves a larger policy question of whether regularly assigned Conductors who are qualified as Locomotive Engineers (called "Engineer Service Brakeman" or ESBs), are liable for discipline when unavailable for ad hoc Locomotive Engineer (LE) trips including off the Locomotive Engineer Extra Board ("LEEB").

21. In CP's view, Mr. Desjarlais was on the working board, had full access to technology in order to check his position(s) and therefore was subject to a call for work just like any other unassigned employee. CP argued that Mr. Desjarlais at the time of the call had invoked none of the collective agreement entitlements which could have removed him from the working board. As a result, he had an obligation to take any call to work, whether as an ESB or as a conductor.

22. The resolution of this difference of opinion necessarily comes from the LEEB's negotiated wording.

23. The 7 “conditions” in Item 6 leads to certain observations. Despite the characterization of the LEEB as a “voluntary board” (U-1; Union Brief; Paragraph 6), its wording governs both employees who volunteered in writing to be on the LEEB and those who did not. Item 6 sets out a process for calling these different types of employees to work.

Condition #1

24. For ease of reference, this condition reads:

> 1. **Qualified employees not holding regular positions of Locomotive Engineer who desire to perform work on a single trip basis will indicate their desire to do so in writing** at each general advertisement of assignment or immediately when they are no longer able to hold the position of Locomotive Engineer. **They will be placed onto the LEEB, and they will take such work when called**.

25. Condition #1 leads to the following observations:

> - “Qualified employees” for the LEEB excludes LEs who hold regular LE positions;
>
> - Those “qualified employees” who desire to perform work on a single trip must apply in writing; and
>
> - Qualified employees will be placed onto the LEEB and will take work when called.

26. The TCRC argued that the phrase “take such service when called” in Condition #1 has been interpreted as meaning there is no contractual obligation to be available (U-1; Union Brief; Paragraphs 64-66). This may be the case for relief work or spare running.

27. But it is the absence of that phrase from later Conditions in Item 6 which impacts its interpretation, *infra*. The arbitrator does not agree that the use of that phrase in Condition #1 constitutes an ambiguity for the purposes of other provisions in Item 6 dealing with entirely different employees and scenarios.

Condition #3

28. This condition reads:

> 3. A qualified Locomotive Engineer who is first out on the LEEB and not available for service when called will not be subject to a call as a Locomotive Engineer for 12 hours.

29. Condition #3 leads to certain observations:

> - the employees at issue are those who indicated their desire in writing to be on the LEEB; otherwise, they would not have been "first out on the LEEB";
>
> - LEEB employees may be unavailable for a LEEB call;
>
> - the negotiated "penalty" if someone is unavailable is the loss of a chance to be called again for 12 hours; this negotiated wording differs from the usual situation where employees who work in a 24/7 railway operation are liable to discipline for missing a call; and
>
> - Condition #3 comes before Condition #5 which deals with non-LEEB employees.

30. The arbitrator agrees with the TCRC that the parties have already addressed what happens to a Condition #1 "volunteer" who does not take a call. If Mr. Desjarlais had been governed by Condition #1, then he would not get another call for 12 hours.

That loss of a chance to receive extra work for 12 hours is the negotiated consequence for not taking a call.

Condition #5

> 5. If the LEEB is exhausted and all other existing avenues of providing relief from the ranks of working Locomotive Engineers have also been exhausted, qualified Locomotive Engineers not working as such and who are not on the LEEB will be called in inverse order of seniority. In this instance, all miles earned by Trainpersons/Yardpersons working as an Engineer on a single trip basis will be added to the Trainperson's spare board miles for the purposes of regulating its size.

31. Condition #5 leads to the following observations:

> - this condition only applies if the LEEB process of calling in "volunteers" has been exhausted;
>
> - this condition further only applies if "all other existing avenues of providing relief" from the working LE ranks have been exhausted;
>
> - only ESBs, i.e. "qualified Locomotive Engineers not working as such", who have **not** volunteered under Condition #1, can be called in inverse order of seniority; and
>
> - Unlike for Condition #3 which described the penalty for "volunteers" who missed a call, there is no similar wording in Condition #5, or anywhere else in Item 6 from the 2007 MOS, which establishes an agreed-to penalty for non-LEEB employees missing a call.

32. Conditions #6 and #7 also allow CP to withhold a conductor from his regular assignment in order to protect ad hoc LE work.

33. The TCRC did not persuade the arbitrator that employees governed by Condition #5 also had the right not to take a call. Condition #3 in Item 6 of the 2007 MOS deals explicitly with that right for Condition #1 employees ie volunteers. Given the general

obligation to take a call in the railway industry, the parties would have had to address explicitly what happened in Condition #5 scenarios, as they had for Condition #3 situations, if it was to differ from the norm.

34. The TCRC suggested that Mr. Desjarlais' regular conductor assignment somehow insulated him from having to take a call under the Item 6 process. However, it is unclear to the arbitrator to whom Condition #5 would apply if it were not intended to apply to qualified conductors ie "qualified Locomotive Engineers not working as such". The challenge the TCRC described of the same employee possibly being called for different assignments would appear to be a matter for negotiations.

35. The arbitrator received no other plausible alternative interpretation to that resulting from the above analysis of the parties' negotiated wording. Mr. Desjarlais was obligated to take the LE call, just as he would have been for a call as a conductor.

Was there a past practice or estoppel?

36. The arbitrator's above analysis did not find Item 6 from the 2007 MOS ambiguous, which is a usual condition for arguments based on past practice: CROA&DR 4606. The above interpretation for Item 6 from the 2007 MOS also addresses the TCRC's arguments based on *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* 16 L.A.C. 73. An arbitrator must apply the language the parties negotiated.

37. The TCRC did raise the issue of estoppel in its second level grievance letter. In certain situations, where an employer has knowingly failed to exercise its collective agreement rights and a trade union has relied on this practice, an estoppel may exist for the life of the existing collective agreement: CROA&DR 4550.

38. The TCRC did not persuade the arbitrator that an estoppel existed in this situation. The arbitrator could not find the clear evidence, as Arbitrator Moreau required in CROA&DR 3601, that CP had represented to the TCRC that it would not rely on the negotiated wording in Item 6 of the 2007 MOA. Neither did the TCRC persuade the arbitrator that CP had, through words or actions, represented that it would apply the parties' penalty agreement in Condition #3 to situations governed by Condition #5.

39. For example, some of the TCRC's arguments focused on documents which predated Item 6. Similarly, some of the examples characterized an employee on the spare board as being identically situated to an employee not on the spare board (U-1; Union Brief; Paragraphs 47-50). The negotiated language in Item 6 does not support this suggestion. The arbitrator does accept that some evidence may have shown inconsistency in the application of the process, given CP's use of the RJNA code for Mr. Desjarlais in the past (U-1; Union Brief; Paragraph 18). However, that evidence was insufficient to convince the arbitrator that an estoppel existed: CROA&DR 3456.

40. The parties' exhibits demonstrated a difference of opinion about the calling of ESBs which predated Mr. Desjarlais' situation. CP argued that an ESB call was

comparable to any other call (E-1; Company Brief; Tab 13). The TCRC disputed CP's view, as summarized in its Step 1 grievance letter (U-2; Union Exhibits; Tab 14). In a March 1, 2017 letter agreement, the parties did resolve a specific situation of an ESB receiving a call when on an assigned day off. They also agreed to disagree about other ESB situations (U-2; Union Exhibits; Tab 11).

41. The evidence about the parties' diverging points of view did not persuade the arbitrator that CP was estopped from treating a call under Condition #5 of Item 6 as being mandatory.

42. While the arbitrator did not find that an estoppel prevented CP from exercising its negotiated rights under the collective agreement, the severity of the penalty and possible confusion about the process do persuade the arbitrator to overturn Mr. Desjarlais' dismissal.

43. In the circumstances, the penalty of dismissal was excessive, especially if part of CP's discipline analysis was predicated on the now reduced 30-day suspension which this Office reviewed in CROA&DR 4630. The arbitrator notes the TCRC's argument that CP did not refer to Mr. Desjarlais' disciplinary record when terminating his employment.

44. Since this appears to be the first case dealing with the parties' negotiated language for Item 6 of the 2007 MOA, the arbitrator substitutes a written warning for Mr.

Desjarlais' dismissal. CP shall reinstate Mr. Desjarlais in his employment with compensation and without loss of seniority.

45. The arbitrator remains seized for any questions arising from this award.

May 18, 2018

GRAHAM J. CLARKE
ARBITRATOR