CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4673

Heard in Calgary, March 7, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The termination of Conductor W. Belanger.

THE JOINT STATEMENT OF ISSUE:

Conductor Belanger was subject to an attendance contract signed in February 2018 and on May 23, 2018 he was assigned to the Capreol Joint Spareboard and missed a call for train Q11531 22.

Conductor Belanger was required to attend a formal employee statement. As a result of the findings, Conductor Belanger was issued 20 demerits, which resulted in his discharge due to an accumulation of demerits. In addition, he was issued a discharge for violation of his contract signed February 7, 2018.

Union's Position:

It is the Union's position that the Company violated Articles 82, 85, 85.5 and Addendum 124 of the 4.16 Collective Agreement when the discharged Conductor Wayne Belanger on June 12, 2018 the Company issued three separate CN Form 780s, first assessing a discharge to Conductor Belanger for the alleged violation of the attendance contract despite presenting no evidence that he had in fact violated the contract. The second CN Form 780 assessed 20 demerits for the same missed call and then a third CN Form 780 assessing another discharge for accumulation of demerits as a result of the missed call.

The Union submits that Conductor Belanger was discharged on June 12, 2018 and the discharge was arbitrary, discriminatory, excessive, unwarranted, disproportionate and unjustified given the circumstances.

The Union further submits that the Company at the investigation failed to provide any evidence showing that Conductor Belanger had violated the agreement from February 2018 and was neither fair nor impartial and as such violated his substantive rights.

The Union asserts that the conclusion that the Company has arrived to is unreasonable, based on the evidence presented at the formal investigation the Company could not have concluded that on the balance of probabilities that Conductor Belanger's attendance record was worse than that of his peers and presented no evidence to sustain the penalty of discharge.

The Union contends that the discipline ought to be declared *void ab initio* as the Company failed to produce a single shred of evidence that Conductor Belanger had violated his attendance contract or that his attendance was not in line with that of his peers and as such it becomes abundantly clear that the investigation was patently unfair and in violation of Article 82 of the 4.16 Agreement as the investigation was held less than 48 hours from the time of the incident, a violation of Article 82.1.

The Union further contends that this is clearly an instance where the Company was "piling on" in an apparent effort to ensure that the discharge to Conductor Belanger "stuck".

The Union asserts that the three separate assessments of discipline, including a double discharge, for the same missed call equates to "double jeopardy" and as such the discipline ought to be set aside based on this principal alone.

The Union requests that the arbitrator reinstate Conductor Belanger to his employment with full compensation for all lost wages and benefits and no loss of seniority from the time of his discharge on June 12, 2018. Failing that the Union requests that Conductor Belanger be reinstated under the terms that the arbitrator deems fit.

Company's Position:

The Company disagrees with the Union's position. It is undisputed that Mr. Belanger missed a call for work. Given his history, 20 demerits and his subsequent discharge due to an accumulation of demerits was both reasonable and warranted. Notwithstanding the above, Mr. Belanger was aware of consequences for violating his contract and understood that missing a call was considered a violation. By virtue of the last chance agreement, the Union is limited in its ability to grieve Mr. Belanger's termination to a question of whether or not he violated the terms of the attendance contract. Contrary to the Union's claim, Mr. Belanger confirmed during the investigation that he was properly notified. The Union contends that the Company violated Articles 82, 85, 85.5 and Addendum 124, but have provided no particulars, therefore, the Company objects to the inclusion of these baseless allegations as they are in violation of the requirements of the grievance procedure. It is the Company's position that the Union's grievance must fail on the basis of equity and estoppel.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) V. Paquet**
General Chairman	CN Labour Relations

There appeared on behalf of the Company:

V. Paquet	– Manager Labour Relations, Toronto
M. Boyer	– Senior Manager, Labour Relations, Montreal
J. Elshamey	– Manager, Labour Relations, Montreal
S. Mumby	– Assistant Superintendent, Capreol

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairperson, Sarnia
J. Lennie	– General Secretary Treasurer, Port Robinson
P. Boucher	– General Chairperson, Trenton

AWARD OF THE ARBITRATOR

The Grievor, at the time of the incident, was twenty-five years old and had six-and-a-half years of active service. He was assigned to the spare board and had accumulated 45 demerits, four written reprimands and three suspensions. All of the 45 demerits were related to attendance issues. As his records reflects, he had been disciplined seven times between April, 2014 to February 2018 for attendance related issues.

On December 14, 2017, the Grievor was called to work as a Conductor on train Q107. He did not accept the call. Rather, he booked himself unfit. There is no dispute that the Grievor missed that call. Following a formal statement – and to avoid dismissal – he was given a last chance. The parties agreed to a 30-day suspension, coupled with a two year Last Chance Agreement (LCA) dated January 29, 2018 (Company Exhibit, Tab 3).

Within four months of signing that agreement, the Grievor missed a call for work as a Conductor on May 23, 2018. Following an investigation, the Grievor was assessed 20 demerits. This resulted in his discharge due to an accumulation of demerits. In addition, the Grievor was issued a separate discharge notice for violation of the LCA.

There is no dispute that the Grievor's conduct, in missing the call on May 23, 2018, was culpable and justified discipline. In response the Company issued three separate Form 780s (Union Exhibit, Tab 6): one for the missed call imposing 20 demerit points; the

second a dismissal for the Accumulation of Demerits; and, the third a “Discharge for Violation of your contract signed on February 7, 2018”.

The Union argues that by adding a third Form 780 assessing a discharge for violation of the Grievor’s LCA - after issuing the 20 demerits and discharge for the accumulation of demerits - the Company was “pilling on”. Further, it asserts that having assessed two separate penalties for the same infraction, the Company “*cemented the two together*” and there was no way to separate them. It then argues that, in light of the specific language of the LCA (Company Exhibit 3), the grievance pursuant to the LCA must fail because the Company did not prove that the Grievor’s conduct was outside of a “*record of attendance equal to or better than the average for the employees in his classification at his location*”, or that he “*failed to maintain an attendance record equal to or better than the average of his peers, including but no limited to instances of missed calls for any three month period within the two years in question*”. Consequently, having failed to prove this LCA aspect of the three Form 780 disciplines, all three of the disciplines fail *ab initio.* I cannot agree.

In the first discipline, the Company assessed 20 demerit points for the missed call. The second Form 780 confirmed the Grievor’s dismissal for having exceeded the demerit limits. Then, the Company added another, concurrent, discharge assessment based on an alleged breach of the LCA.

It is a generally held proposition (**CROA 4682 and 4492)** that an arbitrator should look at the individual allegations as a whole and not treat each possible rule violation as a separate failure; *Collective Agreement Arbitration in Canada; (4th Ed.) Snyder; para. 10.80)*. Looking at the circumstances as a whole, there were no additional grounds "added on" which motivated the Company's actions nor any imposition of a further disciplinary penalty in addition to the original discharge resulting in the assessment of demerit points. In short, the disciplines were not "cemented" together; there was no double penalty imposed; and, there was no "piling on".

The application of an LCA depends on the specific language contained therein. I agree with the Union's assertion here that: having regard to the specific language contained in the LCA, the Company failed to prove its case to ground its application and a resultant dismissal. However, given my conclusions above, that becomes a moot issue.

The only remaining question is: was the assessment of 20 demerit points, and ultimate dismissal for exceeding the maximum demerits, reasonable?

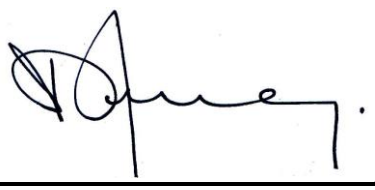
The Grievor's unenviable disciplinary record reflects that he had accumulated 45 demerits related to attendance issues alone. In addition to those, he was suspended for a further attendance failure in December 2017 and was provided with a last chance opportunity (in January 2018) to amend his behaviour. Nevertheless, he missed a further attendance call on May 23, 2018.

A review of the cases submitted, in particular **CROA 4569**, makes it apparent that the imposition of 20 demerits for a missed call in the Grievor's circumstances amounts to a fair and reasonable assessment. The consequences of the 20 demerits issued here are that the Grievor exceeded the 60 demerits available to him which resulted in his dismissal.

The Grievor's tenure with the Company was comparatively short. His record was abysmal. While he made a compelling plea to be given "*one last chance*" to rectify his behaviour and become a good employee (Union Exhibit, Tab 5; Q. 23), I cannot disregard the fact that – although the LCA does not apply here – he was given a last chance, not four months earlier, and he nevertheless committed the same breach that he was originally dismissed for.

Furthermore, it cannot be said that the Company failed to take into consideration a salient fact or circumstance that might mitigate the penalty. While, in my view, his statement regarding his future intentions has the ring of sincerity and truth to it, it would be unwise to override the Company's fairly imposed discipline on the basis that the Grievor appeared to be genuine and sincere. In the circumstances, that is a better decision to be made by the Company directly.

The grievance is dismissed.



April 16, 2019

RICHARD I. HORNUNG, Q.C.
ARBITRATOR