CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4715-C

Heard in Montreal, December 18, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 day suspension to Conductor B. Matyas of Moose Jaw, Saskatchewan.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, Mr. Matyas was issued a 20 day suspension (deferred) described as "For failure to fulfill your contractual obligation as evidenced by your booking unfit October 5, 6 & 7, 2017 while employed as a Conductor in Moose Jaw, SK. A violation of Canadian Pacific Attendance Management Policy. You are to attend a meeting with Assistant Superintendent, Jason Leedahl on Tue, November 7, 2017 as well."

Union Position

The Union submits the Company has improperly applied the process of deferral in the instant matter, which fails the tests required to properly establish Company policy pertaining to assessing discipline, and is in violation of Article 70.09.

The Union submits that Mr. Matyas was disciplined for booking unfit, which the Company is not at liberty to assess discipline for and is contrary to the Collective Agreement (Kaplan Award).

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above. Additionally, it is the Union's position that the Company has failed in providing the absence in question was not bona fide.

The Union asserts the T&E Availability Standards in Canada policy violates the Collective Agreement for reasons previously provided, and disputes its application in the instant matter.

The Union contends the discipline assessed to Mr. Matyas is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty as well as the Company's discipline policy is unreasonable and contrary to the Canada Labour Code. Accordingly, the Union requests the discipline be removed in its entirety, and that Mr. Matyas is made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees and denies the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Company disagrees and denies the Union's position.

The Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Company cannot agree with the Union's allegations regarding Article 39.13 of the Consolidated Collective Agreement. This has been arbitrated in the past and the remedy adopted has been to replace the deferred suspension with a time served suspension.

The Union states that the Company cannot assess discipline for use of the unfit clause. It remains the Company's position that the unfit clause is not to be abused or used to inappropriately obtain time off work.

The Company maintains that the discipline assessed was just, appropriate and warranted in all the circumstances. Additionally, the discipline was properly assessed in line with the Collective Agreement, Company Policy and the Canada Labour Code. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Union has filed a grievance on the T&E Availability Standards but has not brought it forth before an arbitrator. It is the Company position that the Union is in essence looking for two kicks at the can to arbitrate the same issue.

Not only is this a duplicity of action, but within the grievance at hand, the Union has failed to provide any rationale as to why the T&E Availability Standards are in violation of the Collective Agreement or how its application is contentious. It is not reasonable to expect the Company to respond to something which has not previously been provided.

The policy remains in effect and if the Union attempts to arbitrate it within the context of this grievance the Company reserves the right to properly respond.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) S. Oliver**
General Chairperson	Manager, Labour Relations

There appeared on behalf of the Company:

S. Shaw	– Senior Director, Labour Relations, Calgary
D. Pezzaniti	– Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto

D. Fulton – General Chairperson, Calgary
D. Edward – Senior Vice General Chairperson, Medicine Hat
B. Wiszniak – Local Chairperson, Moose Jaw
B. Matyas – Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

1. Following an investigation, Mr. Brent Matyas (the "Grievor") was assessed a 20-day deferred suspension:

> *"…for failure to fulfill your contractual obligation as evidenced by your booking unfit October 5, 6 and 7, 2017 while employed as a Conductor in Moose Jaw, SK. A violation of Canadian Pacific Attendance Management Policy…"*

2. The specific violation for which the discipline was imposed relates to the Grievor having booked unfit for October 5, 6 & 7, 2017. In his explanation for his absence he states (Q. 18-20):

> *Q18: According to Company Records, you have been Unfit for Duty five (5) times since July 21, 2017. Is this correct?*
> *A18: Yes, according to Appendix A.*
>
> *Q19: According to Company Records of these five (5) occurrences, three (3) of the days fell on a weekend. Is this correct?*
> *A19: Yes, however on August 4th I booked off Unfit but did go to work that day later on once properly rested. On October 5th I booked Unfit, which in turn became an Off Duty Injury.*
>
> *Q20: Can you please explain how you were Unfit for three (3) days, from October 5th to October 7th, 2017?*
> *A20: I booked Unfit, on the 5th, and never realized I should have changed my status from being Unfit to Sick. I submitted an FAF after seeing doctor and being off the week.*
>
> Q21: Do you realize that because you were Unfit for more than seventy-two (72) hours you were then placed on Off Duty Injury resulting in your being unavailable for six (6) days?
> A21: Yes.

3. The FAF in question (Union Tab 7) was only completed by the Grievor's physician on October 11, 2017 and provides a diagnosis for the Grievor's absence as

being: "*flu-like illness*". There is no reference to an "*Off Duty Injury*" as referred to by the Grievor in Q.19.

4. The Grievor is asked (at Q.23 and 24) as follows:

> *Q23: Do you understand that the frequency of your absenteeism is considered by the Company as being excessive?*
> *A23: Yes, but these absences were legitimate and to most part substantiated through Company issued documents.*
>
> *Q24: Do you understand that out of the three (3) occurrences that you have booked sick, the three (3) booked off on a personal leave of absence (Unfit) and the extended time off for Company Medical for these to take place on a Friday, Saturday and a Sunday show a definite pattern of weekend absenteeism?*
> *A24: I cannot control the days I am ill, the days of the absences are purely circumstantial. The date of my Periodic Medical yes fell on a weekend, but that was the only time available. In October my illness lasted an entire week, by default the weekend fell into those days.*

5. While the basis for the grievance is clearly the Grievor's absence for October 5, 6 and 7, 2017, the Company, in its submissions and in the documents provided (including Company Exhibits 13 and 15), attempted to show that the Grievor's past performance and conduct reflected an abuse of the Unfit provisions (Article 35) and a demonstrated pattern of misuse of the provision.

6. The Union's argument is, essentially, that notwithstanding the provisions of the Company's Exhibits 13 and 15, there can be no questioning an employee booking Unfit once the clause is invoked.

7. While I do not necessarily accept that, if proven, the Unfit for Duty clause provides a license to employees to invoke it unquestionably or in a manner which proves to be an abuse of the right conferred therein.

8. Nevertheless, the discipline here was imposed relative to the three days in October in question and my determination must be related only thereto (see *Aerocide Dispensers Ltd. vs. USA* [1965] O.L.A.A. #1).

9. The penalty imposed must relate to the grounds put forward by the Company. In this case, while I am given pause by the fact that the Grievor only attended to see a doctor on October 11 for a book off period of October 5-7, 2017, the fact remains that there is no contrary evidence which disputes the Grievor's statements of his illness.

10. That said, the Grievor nevertheless – when he clearly ought to have known better – booked off Unfit when he ought to have booked off as sick.

11. Because he booked off Unfit rather than Sick he was able to be off for 6 days (Question. 21).

12. I do not accept his answer at Q.20 that he: "*never realized I should have changed my status from being Unfit to Sick…*" The Grievor's history of absenteeism and the rationale he has provided in previous grievances surrounding his absences, reflect a detailed understanding of the provisions and processes by which he can book off either as Unfit or Sick.

13. One need only to read Q.9 to conclude that, even though his answer strains credulity, he nevertheless understood the provisions of the agreement and was able to rationalize his absences:

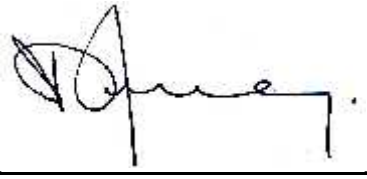
> *Q.9 Can you please explain why you were then off from Friday, July 21 to July 25, 2017 on said Company Medical?*
> *A.9 Had to book off on the 21st, for my medical on the 22nd. I attended the medical on the 22nd and I also had a hearing Medical to do as well, they were going to see if they were able to get me in on the 24th. I called to confirm on the 24th and they couldn't get me in, then on Tuesday the 25th I tried again and still couldn't get in. Called two different places.*

14. The Grievor's "*contractual obligation*" as referred to in his discipline include the obligation to appropriately book off sick when the circumstances warrant it. Here, he failed to do so. That failure cannot go without consequences.

15. Given his record, and having regard to the principles of progressive discipline I conclude that the 20 day deferred suspension is reasonable.

16. The Union's argument relative to the use and application of deferred suspensions has been dealt with by this Arbitrator and others. Accordingly, there is no need for me to address it here.

17. The grievance is dismissed.



February 28, 2020

RICHARD I. HORNUNG, Q.C.
ARBITRATOR