CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4849

Heard in Montreal, August 8, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of M. Totten.

JOINT STATEMENT OF ISSUE:

On January 28, 2022 the Company served the Grievor, Mr. M. Totten, with the following letter:

Please be advised that you have been DISMISSED from Company service for the following reason(s):

- *For failing to ensure proper track protection was in place prior to operating on main track on December 7, 2021 and subsequent violation of the terms & conditions of your conditional reinstatement agreement on last chance terms dated September 1, 2021.*

As a result you have violated the following:

- *Rule Book for Engineering employees 2.2 WHILE ON DUTY*
- *SPC M/W Rules and Instruction, 3.0 Foremen - General Rules and Responsibilities*
- *Rule Book for Engineering Employees rule 7.0 PROTECTING TRACK UNITS AND TRACK WORK ON MAIN AND OTHER SIGNALLED TRACKS*
- *Rule Book For Engineering Employees 7.1 Before Acting on a TOP*
- *Engineering Life Saving Rule-1. Ensure proper track protection*
- *September 1, 2021- Conditional Reinstatement Agreement on Last Chance Term 8. Mr. Totten must comply with all policy, procedures, rules, and attendance requirements.*

The Union contends that:

As set out in detail in the Union's grievance of February 3, 2022, the Company generally violated both the word and spirit of the Grievor's September 1, 2021 Reinstatement Agreement, with special emphasis placed on Items 6 and 7 of that Agreement.

The Grievor had been off work for an extended period because of the death of his wife and the problems he had with coping. In violation of the September 1, 2021 Agreement, he did not receive a screening interview from his local manager nor did he complete any training or rules requalification. His D Card was not current. In sum, he was not prepared to return to the position he was assigned. In the words of the February 3, 2022 grievance, the September 1 Agreement did "not simply set out the conditions that Mr. Totten has agreed to be governed by but it set out the conditions that the company must be governed by as well." The Company violated those conditions and blamed the Grievor for the consequences of it.

The dismissal of the Greivor was unjust and unwarranted in the circumstances.

The Union requests that: The Company be ordered to reinstate the Grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

Company Position:

The Company denies the Union's contentions and declines the Union's request.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company maintains that the Grievor was on track without authority and as a result he violated the rules listed on his discipline letter in addition to the terms and conditions of his conditional offer of reinstatement on last chance terms.

In regards to the Union's contentions that the Company violated the conditional offer of reinstatement, the Company cannot agree. The Company maintains that it met the requirements of said agreement and that no violations have occurred on the Company's part. The Company further maintains that D Card rules qualifications are valid for three (3) years and as such, the Grievor's rules qualification was valid at the time of the incident. Moreover, the Grievor willingly accepted the overtime call out. If he felt that he was not qualified or capable of performing the tasks required with the callout, he had a responsibility not to have accepted.

For the foregoing reasons, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

As an additional comment, 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.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
President	Director, Labour Relations

There appeared on behalf of the Company:

L. McGinely	– Director Labour Relations, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

Background

1. The grievor was hired in 2011, dismissed in December 2019, reinstated with a Last Chance Agreement in September 2021 and actually returned to work on November 11, 2021. On January 28, 2022, he was dismissed for Rules violations and violations of his Last Chance Agreement.

Submissions of Parties

2. The Union argues that at the heart of this matter is whether the grievor was properly Rules qualified to do the work he was asked to do. It argues that because of his lengthy absence from work, his "D" card had expired and Company rules required him to be re-certified before working as a foreman.

3. The Union notes that the Company failed to live up to paragraphs 6 and 7 of the Reinstatement Agreement, requiring initial meetings and proper certification. In so doing, the Company had set the grievor up to fail.

4. It argues that the Company is not entitled to rely on the Reinstatement Agreement, as it is not coming to the matter "with clean hands", having failed to meet their own obligations.

5. Finally, the Union notes that the grievor had no previous Rules violations, had a medical note indicating he had problems of concentration and had suffered the loss of his wife and mother of his children only a month earlier.

6. The Company argues that the grievor committed a cardinal Rule violation, which could have resulted in loss of life, when he put his Hi-Rail vehicle on a live track outside the limits of TOP protection provided to him.

7. The Company argues that the grievor did have an existing "D" card, as it is valid for a period of three years. In the alternative, it argues that the Union and grievor, if there had been any concerns about re-certification or other terms of the Agreement, cannot "wait in the weeds". It submits that the grievor could have refused the work, but instead chose to do it.

8. The Company submits that the grievor, after committing a cardinal Rule violation, then made the situation worse by failing to declare it, lying to Company officials about what had taken place and encouraging a subordinate to lie on his behalf. The necessary link of trust between the parties has been broken.

Did the Grievor have a Valid "D" Card?

9. A "D" card is necessary for directing or protecting others from track movements. While the "D" card is valid for three years, the Company normally requires annual re-certification.

10. Company regulations, however, foresee additional requirements when an employee has been off work for some time. An employee off work for less than 12 months is required to re-certify, while one off for more than 12 months is required to start over:

Absence length	Valid rules Card	Card has expired
Up to including 12 months	Attend recertification program, which will include training and corresponding examination. Employees must meet recertification standards as outlined in the policy above.	Will need to attend the full initial course again.
Greater than 12 months	Attend initial certification program, which will include training and corresponding examinations. Employees must meet the certification standards as outlined in the policy above.	

11. The grievor had been off work for nearly two years and clearly fell into the latter category.

12. Consequently, I agree with the Union submissions that the grievor did not have a valid "D" card.

Did the Company Fully Respect the Reinstatement Agreement?

13. The Reinstatement Agreement specifically sets out a return to work process, requiring, amongst other obligations:

> 6. Prior to any return to active service Mr. Totten will be required to successfully complete a screening interview with his local manager concerning his ongoing employment and provide assurance that he will comply with Company policy, procedures, rules and attendance requirements moving forward. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the return to work of Mr. Totten. If he desires, an accredited representative may accompany Mr. Totten to this interview.
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> 7. Before recommencing active duty, Mr. Totten will be required to successfully complete any necessary training and/or rules re-qualification. Mr. Totten will only be entitled to compensation and/or expenses associated with his attendance at such training or re-qualification.

14. No such meetings were held, prior to the grievor returning to active service. As indicated above, he did not do any re-training and his "D" card was therefore no longer valid.

15. Consequently, I agree with the Union submissions that the Reinstatement Agreement was not fully respected by the Company.

Does the Above Failure Excuse the Rule Violation?

16. Both parties accept that safety is critical in this inherently dangerous industry. For maintenance of way activities to take place as safely as possible, track control is essential. The Company has set out in its Brief information on Track Occupancy Permits (TOPs) and their importance to safety:

> By way of background information, a Track Occupancy Permit (TOP) is provided by the Rail Traffic Controller (RTC) to the engineering Foreman, for a specific section of track. Once the TOP is provided, the Foreman the TOP has been assigned to "owns" that section of track, meaning no other units (trains, hi-rails, equipment) can occupy that section without receiving authorization from the Foreman. The Foreman can provide authorization to

> another engineering services crew to work on that section of track. This is often referred to as providing protection to a sub-foreman.
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> TOP's are essential for ensuring the safety of the engineering crews working on track as they restrict any movement from entering those boundaries without express authorization. In fact one of the quintessential rules of the railroad industry is CROR 42, which is a violation of planned protection (movement entering a TOP without permission), which will be described in greater detail below.

17. In December 2021, the grievor already had approximately ten (10) years of service with the Company doing maintenance of way activities, with some eight (8) years as a sub foreman and four (4) years as a foreman.

18. During the Investigation, the grievor generally acknowledged that he understood the various engineering and safety rules applicable to track work and protection. However, he reiterated multiple times that this understanding was subject to his being updated on the Rules. He did not contest that these Rules had not changed since 2015.

19. He fully realized the seriousness of a TOP violation:

> Q42. Do you understand that this type of incident could have catastrophic consequences for employees involved?
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> A42. Yes.

20. It is my view that the grievor clearly knew that going on a live track, outside a TOP, was a major error, which could have resulted in his own death, the death of his colleague in the Hi-Rail, or the death or injury of fellow employees in on-coming trains.

21. Rather than admitting his error, the grievor attempted to cover it up by a series of actions:

1) He lied to Roadmaster M. Mazereeuw about whether he had put the hi-rail truck on the track (see Tab 7, p.26 Company documents);

2) He twice lied to W. Sherrick about whether he had put the hi-rail on the tracks (see Tab 7, pp 28-29 Company documents);
3) He told A. Reyes to lie on his behalf (see Tab 7, p. 39 Company documents). The grievor in his testimony does not deny this, stating that “he did not recall” (see p. 47).

22. When the incident occurred, the grievor was already subject to a Last Chance Agreement:

> 8. Mr. Totten must comply with all policy, procedures, rules, and attendance requirements.
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> 9. Following reinstatement, any alleged violations or failure to comply with any of the terms of this Agreement during the two (2) year period of this agreement outlined herein will result in Mr. Totten’s removal from service and an investigation that may result in discipline up to an including dismissal.
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> 10. If, following fair and impartial investigation, the Company’s determines that Mr. Totten violated or failed to comply with any of the terms and conditions of this Agreement:
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> a. It shall be considered just cause for the termination of the employment of Mr. Totten;
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> b. The Company, in its sole discretion, may elect to dismiss Mr. Totten from Company service or impose a lesser disciplinary penalty;
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> c. Any grievance regarding the discipline assessed shall only be for the purpose of determining whether Mr. Totten violated or failed to comply with the terms an conditions of this agreement; and
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> d. it is agreed that the Arbitrator, in respect of any such grievance, shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that Mr. Totten violated or failed to comply with any of the terms and conditions of this Agreement.

23. The Union argues that a simple violation of a Reinstatement Agreement is not sufficient in and of itself. Other factors need to be considered. It has argued forcefully that the Company had not met its obligations under paragraphs 6 and 7 of the Agreement and that failure makes the Agreement unenforceable. The Union notes by way of mitigation that the grievor was out of service for a lengthy period, had sizable

debts and had very recently lost his spouse. It has produced a medical document which attests to the grievor's health, and possibly an occasional loss of concentration (see Union documents, Tabs 14 and 15).

24. If the Rules violation had concerned a technical or potentially ambiguous Rule, or one where the exercise of judgment was required, the Union's argument would be much stronger. Here, however, the Rule is crystal clear – you can't get on a live track without TOP protection. To do otherwise is to court obvious disaster, both for the grievor and his colleagues. I do not believe that any refresher course was necessary for the grievor to be able to know, understand and follow this cardinal Rule. Indeed, he acknowledged in his investigation the potentially catastrophic consequences of such a violation. To push the argument to its furthest, even if there had been no Rules, no sensible employee would get on a live track without protection.

25. Even if the grievor had been confused about his location, there were multiple options available to him. He could have radioed for directions, as Mr. Mazeereuw pointed out. He could have checked with other CP employees, who were present at the crossing (see statement of M. Farnell, Tab 7, Company documents). He could and should have involved his colleague A. Reyes in obtaining and verifying the TOP. He did none of these things. He got on the main line without ensuring he had TOP protection.

26. He then made a very bad situation far worse by not notifying anyone of the violation and repeatedly lying about the violation to his superiors. His initial story about never having been on the tracks only changed when informed that M. Farnell had seen him on the tracks. This dishonest behavior is made even worse by having encouraged his subordinate, A. Reyes, to lie on his behalf.

27. The grievor was back on a Last Chance Agreement, which required him to follow all policies. Here, he clearly failed to follow an obvious cardinal Rule and then attempted to hide the error. The Last Chance Agreement notes that my jurisdiction is limited to determining whether a Rule violation occurred. Such a violation clearly occurred.

28. Even if I exercised my discretion concerning the Last Chance Agreement, I am compelled to consider the Agreement as an expression of the parties' intentions.

29. In these circumstances, whether simply applying the Last Chance Agreement, or applying broader principles of just cause, I find that the Company was justified in terminating the employment of the grievor.

30. The grievance is dismissed.

September 18, 2023

JAMES CAMERON
ARBITRATOR