CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4869

Heard in Montreal, October 17, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE – MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf of Mr. K. Spence.

JOINT STATEMENT OF ISSUE:

On February 7, 2023, the grievor Mr. Kaven Spence, was advised that he was "dismissed from company service effective February 7 2023 for submitting fraudulent time claims for time that you did not work from August 1 2022 to December 9 2022." A grievance objecting to the dismissal was filed on February 23, 2023 and was denied on March 10, 2023.

The Union contends that:

1) The grievor entered time claims that were approved;

2) The evidence is clear that any alleged fraudulent time claim that the grievor was accused of making was not the result of deceit or fraudulent intent but of the actions of Manager Mike Stilwell and the Project's Contracting Service Director Li-Lian;

3) The investigations held were unfair and the dismissal assessed was unwarranted.

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.

The Company Position:

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

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 his past discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The fact that the Grievor's time claims were approved does not legitimize the claims. Nor, does it negate that they were entered with the intent of receiving payment for work that he did not perform.

Despite the Union's allegations to the contrary, the record provides that the Grievor did not have blanket permission to enter time claims for hours that he was not working.

The Company's position continues to be that the dismissal assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a

reason to disturb the discipline assessed and requests that the Arbitrator dismiss the Union's grievance in its entirety.

FOR THE UNION:
(SGD.) W. Phillips
President - MWED

FOR THE COMPANY:
(SGD.) L. McGinley
Director, Labour Relations

There appeared on behalf of the Company:
D. Zurbuchen – Manager Labour Relations, Calgary
A. Cake – Manager Labour Relations, Calgary

And on behalf of the Union:
W. Phillips – President, MWED, Ottawa
D. Brown – Counsel, Ottawa
K. Spence – Grievor, Oshawa

AWARD OF THE ARBITRATOR

Context

1. Kavin Spence was terminated from his position for time theft. At the time of his termination, he had ten years seniority in Engineering, working in his last position as a Flagman. He had a relatively clean disciplinary record, with the greatest previous discipline being 15 demerit points.

Positions of the Parties

Common Positions

2. Both parties agree that the Company has the burden of proof to show that there was an intentional theft. As set out in **CROA 3187** dealing with the alleged theft of Company property, Arbitrator Picher held:

> While the Arbitrator can appreciate the suspicion which the Company attaches to the circumstances surrounding the jacks which were in the grievor's possession, it remains the employer's obligation to prove the elements of deliberate theft, on the balance of probabilities. While inferences may certainly be drawn from circumstantial evidence, the evidence as a whole must be of a sufficient reliability to sustain a finding of wrongdoing on the preponderance of the evidence…

3. Both parties agree that intentional theft falls into a highly serious category. The Company cites Labour Arbitration Canada (Mitchnick and Etherington, 2nd Edition:

> 11.4 Theft
>
> Historically, arbitrators have viewed theft as being among the most egregious forms of misconduct, one which justifies discharge because it destroys the trust which is fundamental to the employment relationship. The actual value of the stole property, accordingly, was often considered to be of little significance in the determination of whether just cause exists or in the choice of penalty. However, many recent decisions suggest that while theft continues to be considered a very serious offence, dismissal does not automatically follow. In deciding whether to uphold a discharge, the arbitrator should inquire whether the trust relationship between the employer and the employee has been irremediably destroyed. The particular facts of each case – including the nature of the business, the level of employee supervision, the seriousness of the offence, the admission or non-admission of wrongdoing, the existence of genuine remorse and the credibility of the grievor – will all affect the outcome of the inquiry. An example of the modern approach is *Livingston Distribution Centers Inc. and Teamsters, Local 419* (1996), 58 L.A.C. (4th) 129 (MacDowell).

4. Both parties agree that Mr. Spence claimed and was paid for time for which he did not work.

Position of the Company

5. The Company takes the position that the grievor intentionally claimed for time he did not work and thereby committed time theft. It alleges that some 380 hours were claimed and some $20,000 paid, for time which was never worked and for which he was not entitled to be paid.

6. The Company further notes that the guidelines to its Discipline and Accountability Policy (Tab 11) under Conduct Unbecoming Offences, places “Theft, fraud or the unauthorized taking of time or property” as its first major offence.

7. It contests the position of the Union that there had been an agreement between his supervisor, Mr. Stilwell and the grievor that overtime could be charged for time not worked. It further argues that even if such an agreement had existed, it would be invalid and cannot be relied upon to excuse the conduct of the grievor. It submits that the

grievor had an independent, personal, obligation to enter his time truthfully and correctly.

8. The Company claims that the conduct of the grievor has broken the bonds of trust and the arbitrator should not intervene to overturn the Company's decision to terminate.

Position of the Union

9. The Union alleges that there was no intentional time theft, and that the situation was out of the ordinary, and resulted in confusion on the part of the grievor.

10. The Union underlines, given the seriousness of the accusation, that clear, cogent and compelling evidence is required to be able to conclude that there was dishonest intent:

> Brown and Beatty (in Canadian Labour Arbitration (5th ed) para 7:23) put it like this: Unless the collective agreement provides otherwise, to justify disciplining an employee for theft an employer must prove, on clear, cogent and compelling evidence, both that the person misappropriated property or money that did not belong to her, and that she did so with a dishonest intent.

11. The Union cites **CROA 2119** that the theft must be intentional:

> The material establishes to the Arbitrator's satisfaction that (the grievor) knowingly falsified his own time claims, as well as those of employees working under his supervision by claiming payment for hours not worked… It cannot be disputed that (the grievor) submitted time claims for himself and for other employees for work which neither he nor they performed during the pay period in question. Counsel for the Brotherhood submits that there are mitigating circumstances, including the fact that the Company had tolerated some laxity in the method of timekeeping including, among other things, allowing employees to "work in" their time as a means of being compensated for hours which they did not in fact work… (However) the claims so submitted (in this case) were in no way related to the "working in" system and cannot be explained or excused on the basis of any understanding with the grievor's roadmaster or any other person in a position of managerial responsibility. In the circumstances

> I am compelled to conclude that the actions of the grievor were calculated to defraud the Company of wages for his own benefit and for the benefit of certain selected employees. It is well settled that an act of deliberate theft will generally be a dismissible offence, as it brings to an end the relationship of trust fundamental to the duties and obligations running between employer and employee…

12. Finally, the Union points out that carelessness or a momentary lapse of judgment should not be confused with deliberate and intentional theft. As Arbitrator Picher points out in **CROA 4225**:

> The issue in this grievance is whether the grievor acted in a deliberate and calculated way to claim overtime to which he was not entitled or whether, as the Union submits, he was simply careless in filling out the time sheets for June 20, 2012. Upon a close examination of the evidence I am inclined to accept the Union's submission that there was no deliberate intent to defraud on the part of Mr. Boileau. There is no prior record of any such incident in his previous eighteen years of service, and while his disciplinary status was precarious at the time of this incident, nothing on his record involved acts of dishonesty. I am satisfied that what the instant case discloses is an isolated lapse in judgement on the part of the grievor, and not a deliberate attempt at theft.

13. The Union notes that the grievor is not required to prove the truth of his explanation, only that it is reasonable and plausible:

> In Toronto Transit Commission v. A.T.U., Local 113 (1997), 62 L.A.C. (4th) 30 (Ont. Arb.), the arbitration board stated, at pp. 58-59: While the burden of proof on the Employer is to establish the allegations of misconduct on a preponderance of the credible evidence or on a balance of the probabilities, the evidence must be clear and cogent. The Adjudicator continued: 9 142 …As the cases cited by Brown & Beatty suggest, employees may be required to provide their employers with explanations of circumstances that have raised suspicions about trustworthiness. This burden, however, does not mean that an employee must prove the truth of his or her account, but must show that any explanation by the employee is reasonable and plausible in all the circumstances … 146 As both Counsel agreed, the burden of proof in this termination grievance lies with the Employer. The Grievor bears no burden of disproving the theft allegation on the balance of the probabilities. He must, however, provide some reasonable and plausible explanation for the circumstances …

14. The Union takes the position that the grievor should have obtained a day time flagging position, given his seniority. The grievor and Mr. Stilwell resolved the matter by his supervisor agreeing that he could charge overtime on his night time position. It notes that his supervisor entered or endorsed his time claims on multiple occasions.

15. It further takes the position that the claiming of unworked overtime was endorsed by Li Lieu Lui, the contractor's representative, on the project he was working on.

16. Finally, the Union urges that termination is much too harsh a penalty in the circumstances. It argues that the grievor should not be "the fall guy" for any dishonest actions on the part of his supervisor.

Issues

A. Was there intentional time theft?

B. Should the termination of the grievor's employment be overturned?

Analysis and Decision

A. Was there intentional time theft?

17. This case is not about whether the grievor claimed for and was paid for work which he did not perform. This clearly took place. During the investigation, the grievor confirmed that he had only worked a 12 hour shift on "a couple of occasions", despite charging overtime throughout the period in question (see Q and A 28-29, Tab 5, Company documents).

18. This case is about whether there was intentional time theft, based on clear and cogent evidence, weighed on the basis of a preponderance of the evidence.

19. There is no dispute that the grievor was paid, based on time sheets signed primarily put in by him, for hours of work which he did not do. While assigned to an 8 hour shift, he a) charged an additional four hours of overtime between August 2 and December 2, 2022 and b) charged an additional 2 hours per shift for the first three weeks of August 2022.

Additional Four Hour Claim

20. The grievor contends that there was an agreement reached between he and his supervisor, a member of management, that he could charge an additional four hours per shift. He states that this agreement was reached because he lost an opportunity to work the day time flagging position and the possibility of overtime. Instead of putting in a grievance for each time the other flagman worked overtime, the agreement resolved the issue:

> For that job (i.e. the Highway 401/Kennedy Road project) Michael Stilwell told me I could charge 12 hours of work every shift. (Q and A 29).

21. The Grievor also provided during the investigation, the following note for the record:

> Noted by Kaven. This bid position was listed as a day shift, but they moved him to nights, but the 401 contractor also wanted day shifts and Kaven wasn't offered to go to the day shift, they brought someone else instead. Any overtime that was worked during the day should have been offered to Kaven and wasn't so he was entitled to overtime worked during the day. **Kaven didn't make a big deal about it and figured that's why there was no issue brought up about him putting in 4 hours overtime everyday. (Emphasis Added)**

22. The supervisor, Mr. Stilwell was asked during the investigation whether he had given this permission, which he denied:

> Q115 Question for Michael Stilwell: Between 08/01 and Nov 15 Did you give Kaven permission to charge 8 hours regular and 4 hours

> overtime every shift for the Hwy 401 project no matter how many hours he actually worked?
> A115 **No**. (**Emphasis Added**)(Tab 4)

23. The grievor testified during the hearing that this denial amounted to Mr. Stilwell not telling the truth about their arrangement.

Additional Two Hour Claim

24. The grievor contends that he did not obtain a position he should have obtained in the Spring. He spoke to Mr. Stilwell who agreed to settle the matter by permitting him to claim an additional two hours per shift until he had made up the loss:

> The extra 2 hours were because I found out there was a junior flagman working while I was laid off after I had inquired with Michael Stilwell if there was any job that I could bump into. I brought this up to Michael Stilwell and he agreed to pay me 2 hours of overtime until the time lost was made up for. See: Tab 3. 10. As proof of Supervisor Stilwell's involvement, the grievor stated the following: Q33. Do you have anything in writing showing Michael Stilwell telling you that could charge an additional 2 hours overtime in the beginning of August? A33. Just that STI0019 is the one that entered the additional 2 hours overtime in SAP

25. During the investigation, it appears that Mr. Stilwell agrees that he gave Mr. Spence permission to charge an additional 2 hours of overtime per shift:

> Q117 Question for Michael Stilwell: Between August 2, 2022 and August 22, 2022, Kaven was receiving an extra 2 hours of overtime per shift. Did you approve this overtime?
>
> A117 The contractor was working 24 hours a day so he would've had this overtime.
>
> Q118 Question for Michael Stilwell: Kaven stated that as compensation for a junior flag man working a job that he wasn't offered you agreed to pay him an additional 2 hours of overtime per shift until the time lost was compensated. Is that correct?
>
> Q119 Yes.

26. Mr. Stilwell did endorse at least some of the overtime claims of the grievor. At issue is whether this endorsement was valid, or at least believed to be valid, by the grievor. For the reasons that follow, I find that the agreement was not valid, and could not reasonably be believed to be valid by the grievor.

27. In any workplace, there will be some common sense and practical accommodation made between the employer and the Union. Permission to leave early in limited circumstances would be an example. However, here the agreement, if it existed, was clearly for far more than a minor accommodation. Here, some 55 separate time sheets were falsified. The grievor could not reasonably believe that this arrangement could be valid. If he had a valid claim for losses suffered for a position he was entitled to, the obvious solution is to put in a grievance with his Union. The fact that the "arrangement" was never put into writing is strongly suggestive that the grievor and Mr. Stilwell did not want to make it "official".

28. The alleged agreement also makes no financial sense. The grievor contends that the agreement avoided his putting in repeated grievances for overtime being done by the day time flag person. However, the result of the "arrangement" is that the Company would be charged twice, once for the actual overtime done by the day time flag person, and an additional four hours claimed by the grievor. A grievance would have resolved any issue.

29. The position of the grievor that the contractor's representative had endorsed this practice is frankly perplexing. During his investigation of January 27, 2023 the grievor entered into evidence a text message he received on October 25 2022 from Ms. Li-Lian Liu, the Project Manager of the Highway 401/Kennedy Road Project. The text stated the following:

> Hi Kaven! Just confirmed that for the Hwy 401 job sadly expenses are against the collective agreement rules for the job. However, you are

> entitled to OT hours and a meal break once 11 hours have ben reached. Sorry for the delay in the reply. Appreciate your time and help. If anything, make sure charge all your hours and OT hours for the work. See: Tab 12.

30. A plain reading of the text indicates that overtime "for the work" and a "meal break once 11 hours have been reached". It nowhere indicates that overtime can be claimed without having worked the time. The representative encourages him to ensure that he charges his overtime for the work performed: "make sure charge all your hours and OT hours for the work" (emphasis added).

31. If the grievor truly believed he had an agreement with his supervisor to charge out non-worked time, why would there be any need to seek additional reassurance from the contractor? Having done so, the fact that the grievor relies on the above email as confirmation that he is entitled to charge out overtime for non-worked time, when the text does not say this, calls into question whether the grievor had a sincere belief that what he was doing was permitted.

32. There are specific examples cited during the investigation which call into question the credibility of the grievor. On November 25, 2022, there was a text exchange between Project Manager Lui and the grievor, in which Mr. Spence informs him that he will not be in because he is "currently battling a fever" (Tab 4, Union documents). The grievor claimed that he worked throughout the week of November 21-25, despite the GPS on his truck showing no movement:

> Q107 Li-Lian Lui's memo states that the MTO contract administrator reported that you were not present for any of your evening shifts between November 21 and November 25, 2022. Did you work those dates?
> A107 **I did**
> Q108 Where did you work between Nov 21 and Nov 25?
> A108 **I talked to the contractor the previous week and they told me that they would be working away from the track so I was in Toronto Yard on stand by**. Kaven states that he was actively trying to minimize the risk of car accidents by not going in to the site when

> he wasn't needed. Kaven states that he's mentioned not driving in when not needed to Michael Stilwell and Sam Iaboni in the past. (**Emphasis Added**)(Tab 4)

33. The grievor therefore told the contractor he was sick and would not be in to work, yet claimed for time worked and four hours of overtime for all five days of November 21-25. He did not appear on site, but claimed full time and overtime for being on standby in the Yard.

34. His claim that he was not needed on site is belied by the fact that the day shift flagman worked during the night to cover his absence. Richard Drynan reported:

> Q113 Question for Richard: Are you aware of which flag man covered for Kaven during the week of Nov 21?
>
> A113 I know that for at least one day during the week of Nov 21 the daytime flag man had to cover the night shift when they were doing a significant bridge lift that had been planned for a while.

35. The nature of the relationship and any arrangement made between the grievor and Mr. Stilwell is suspect. Mr. Stilwell no longer works at the Company and did not testify. However, his actions show a highly improper intervention on his part with the grievor during the Company investigation:

> 11:05 AM, Mr. Stilwell to the grievor: "Can you please give me a call when you have a moment?" At 7:02 PM, the grievor: "?" Mr. Stilwell immediately responded: "Richard Drynan who replaced Krieg Pattyn is waiting for you for the test. Don't let him see your vehicle inspection book" (i.e. The green book).

36. This intervention clearly manifests a dishonest intent on the part of Mr. Stilwell. He sought to obstruct the Company investigation of alleged time theft by the grievor.

37. The loss or destruction of the green book itself is not helpful to the grievor, as he admits that it will not justify his overtime claims:

> Q22 On the days where the truck shows you going to site and coming back to Toronto Yard in a time period shorter than the 12 hours you

> were paid for, would the green book provide any other details that could explain the difference in time paid and time actually worked?
> A22 **No** (**Emphasis Added**)

38. A review of the facts of this case clearly shows that the grievor intentionally falsified many time sheets over a period of months. Whatever "arrangement" which may have existed between Mr. Stilwell and the grievor cannot be relied upon by him to justify these actions, as he had to have known that the "arrangement" was invalid. An employee cannot rely on the approval of a superior when the actions themselves are clearly incorrect. Moreover, Mr. Stilwell contests the existence of any approval of the many four hour overtime claims made by the grievor. The grievor's attempted reliance on approval from the contractor's representative points to an attempt to justify the unjustifiable. The grievor's actions in November, also point to dishonest attempts to claim overtime for time not worked.

39. In my view, the evidence clearly shows that the false time entries were made by the grievor without any true belief that he had legitimate approval from a superior to do so. As such, intentional time theft has been established by the Company.

B. Should the Termination of the Grievor's Employment be Overturned?

40. Given the above finding that there was wrongdoing, and some form of discipline is appropriate, the next step is to consider whether termination was excessive in the circumstances.

41. The Company cites the oft-quoted passage in William Scott concerning factors to be considered in making such a determination:

> In evaluating the immediate discharge of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company in deciding whether to sustain or interfere with the Company's action' (at p.117). The following is an oft-quoted, but still not exhaustive, canvass of the factors which may legitimately be considered:
>
> **1. The previous good record of the grievor.**
> **2. The long service of the grievor.**
> 3. Whether or not the offence was an isolated incident in the employment history of the grievor

> 4. Provocation.
> **5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.**
> 6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
> 7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
> **8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it**.
> **9. The seriousness of the offence in terms of company policy and company obligations.**
> 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstances; (c) failure of the company to permit the grievor to explain or deny the alleged offence.
> The board does not wish it to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider. (See Company documents Tab 9).

42. In the grievor's favour is ten years of service, with a relatively good discipline record. Against him is the seriousness of the issue, going to the heart of the employment trust relationship. As Arbitrator Picher held in **CROA 2304**:

> In the Arbitrator's view, notwithstanding the explanation offered by Mr. Ellerbeck, the regrettable conclusion is that he knowingly engaged in a scheme to reduce his working time and increase his incumbency pay in a manner which he knew, or reasonably should have known, was inconsistent the collective agreement and in violation of his obligation of trust in the reporting of his miles worked for pay purposes. (Tab 10)

43. The wrongdoing was not an isolated incident, but rather occurred more than 80 times over many months. Unfortunately, this is not a momentary lapse of judgement, as was the case in **CROA 4225** and **SHP 716**, but rather a conscious, repeated decision to enter time and claim money for which the grievor knew, or should have known, he was not entitled.

44. Given the fact that the grievor works away from the Yard and largely unsupervised, the Company must be able to rely on the validity of his time entries. Theft is a serious offence and the grievor displayed little remorse for his actions. The Company submits that the trust relationship is broken and that termination is appropriate. It points to Bruce Power (see Company documents, Tab 17), saying that the discipline is "within the range of reasonable" and that I should not intervene.

45. I agree that termination is "within the range of reasonable" and therefore decline to overturn the decision of the Company.

46. Accordingly, the grievance is dismissed.

November 21, 2023

JAMES CAMERON
ARBITRATOR