

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 5054

Heard in Edmonton, June 12, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 demerits assessed to Conductor J. McDonald of Kenora, Ontario.

JOINT STATEMENT OF ISSUE:

A formal investigation was conducted, resulting in the Grievor being assessed 20 demerits on December 17, 2019. The discipline was described as follows:

Please be advised that your discipline record has been assessed with 20 Demerits for the following reason(s):

Your attendance, booking sick out of Kenora, Ontario on October 16, 17 and 18, 2019.

A violation of T&E Availability Standard MBNO-026-17 dated April 11th, 2017.

Your employment with the Company is in jeopardy if you commit another offense for which discipline is warranted. Please consult the "Hybrid Discipline & Accountability Guidelines" to learn how you can improve your discipline standing.

Union Position

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. For these reasons, the Union contends that the discipline is void ab initio and ought to be removed in its entirety and Mr. McDonald be made whole.

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 disputes the application of the T&E Availability Standards policy in the instant matter.

The Union contends the discipline assessed to Mr. McDonald is unjustified, unwarranted, and excessive in all of the circumstances, and is in violation of the Canada Labour Code. Accordingly, the Union requests the discipline be removed in its entirety, and that Mr. McDonald 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.

Discipline was determined following a review of all pertinent factors, both mitigating and aggravating, and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the Hybrid Discipline and Accountability Guidelines and the Collective Agreement. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

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

For the Union:

(SGD.) D. Fulton

General Chairperson, CTY-W

For the Company:

(SGD.) F. Billings

Assistant Director, Labour Relations

There appeared on behalf of the Company:

- | | |
|-------------|---------------------------------------|
| A. Harrison | – Manager, Labour Relations, Calgary |
| L. McGinley | – Director, Labour Relations, Calgary |
| S. Scott | – Manager, Labour Relations, Calgary |
| S. England | – Manager, Labour Relations, Calgary |

And on behalf of the Union:

- | | |
|-------------|---|
| K. Stuebing | – Counsel, CaleyWray, Toronto |
| J. Hnatiuk | – Vice General Chairman CTY West, Mission |
| B. Wiszniak | – Vice General Chairman CTY West, Regina |
| J. Rousseau | – Local Chair Div 535, via Zoom, Kenora |
| J. McDonald | – Grievor, via Zoom, Kenora |

AWARD OF THE ARBITRATOR

- [1] The Grievor is a Conductor, having entered Company service in 2012. He is assigned to work the Conductor East Pool out of Kenora, Ontario.
- [2] This is the second of four Grievances heard in the June CROA session involving this Grievor.
- [3] In the first Grievance, **CROA 5053**, the Company was directed to remove a 10 day suspension issued to the Grievor in 2017, for improper radio communications, as culpability for discipline had not been established.
- [4] This Grievance is filed against the assessment of 20 demerits for booking sick for three days in October, 2019, in alleged contravention of the T&E Availability Standard, MBNO-026-17 (the "Availability Standard").

- [5] The issues in this Grievance are:
- a. Did the Company have cause to discipline the Grievor for booking sick on October 16, 17 and 18, 2019? And
 - b. If so, was the discipline assessed just and appropriate?
- [6] For the reasons which follow, the Grievance is upheld.
- [7] The Company has not met its burden of proof to establish the Grievor was not legitimately ill and unable to work on October 16, 17 and 18, 2019. No cause for discipline has been established.

Relevant Provisions

T&E Availability Standard

For Canadian Pacific to be successful and competitive in the North American Railway industry we not only have to provide great customer service, we have to continue our collective efforts at exceling on efficiency and productivity. Give that efficiency and productivity are directly impacted by employee attendance levels, an attendance policy that is understood and adhered to by all is essential.

Effective February 1, 2017, the following availability standard supersedes and replaces all previous availability standards for T&E employees in Operations at Canadian Pacific.

T&E employees have negotiated opportunities provided for in their Collective Agreements to legitimately remove themselves from the working board. Examples of negotiated and also legal absence categories that will not result in discipline under this availability standard include: annual vacation; pre-authorized personal leave; bereavement; jury duty; company business; and time off mandated by the hours of service regulations.

T&E Employees who book off sick on two or more available work days in the calendar month will be subject to attendance review. Disciplinary action may result.

The following absence categories will be handled as more serious offenses separate from this calendar month review:

- Miss calls (including missing calls as an ESB);
- Booking sick or unfit on-call or after accepting a call;
- Booking sick or unfit after call time or after start time of assignment;
- Refusals to protect service;
- Not reporting or reporting late for duty;
- Unauthorized absence (AWOL);
- Exhibiting a patterns of booking sick on weekends or consecutive to other absence types, such as, but not limited to: vacation, paid leave, Earned days off and rest days.

Note: Medical documentation will not be accepted to excuse these absence categories except in extraordinary circumstances involving a documented medical emergency.

Employees requesting to have sick absences excused due to serious medical issues must ensure that satisfactory medical information is received by Occupational Health Services for review within three (3) business from the last day of the medical absence. The three business day requirement will be strictly enforced. Upon receipt of timely and satisfactory information, Health Services will review the request and advise CMC whether the absence has been medically substantiated.

Facts

- [8] The facts can be briefly stated.
- [9] As noted by the Company, the staffing model in this industry is different than in other industries. Employees can be “called in” for work if they occupy a position on a Board. They are called in order of their position, and are required to be available for work when called. When employees are unavailable to work, other employees must be called for work earlier than they may have been anticipating.
- [10] Such absences therefore can have operational impacts which are different than in typical workplaces, given the unique nature of this industry.
- [11] The Grievor’s evidence is that on October 16, 17, and 18, 2019, he booked off sick. On November 25, 2019, the Grievor was investigated by the Company for booking off sick.
- [12] The Grievor’s evidence in the Investigation was that on those three days, he was suffering from a sinus infection, which he treated by taking an over-the-counter medication. He stated he did not seek medical attention, as he has had this illness previously, and it is a seasonal issue.
- [13] The Grievor had also booked off sick in September of 2019 and was Investigated for those absences, but he was not disciplined for those absences. The Union filed the Investigation transcript from the September absences into this proceeding. In that Investigation, the Grievor gave the same evidence as he gave in the Investigation for the October incident: He stated that he called in sick on September 7, 2019 at 2140 and on Friday September 27, 2019; that he had a sinus infection on those dates; and that he was taking sinutab for that illness. On that occasion – like for the October dates – the Grievor did not see a medical doctor.
- [14] The evidence given in both Investigations is the same.

[15] In addition to the October 2019 dates, the Grievor had been disciplined on three previous occasions which related to booking sick, during his seven years of service:

- a. October of 2014: *Informally interviewed* regarding absenteeism between January 1 and October 27, 2014: (3 of the absences were for “booking sick”).
- b. May 4, 2015: Informal handling as part of a grievance resolve;
 - i. *Deferred suspension* for booking sick on January 15, 2015 (and other issues relating to unavailability for work);
- c. March 4, 2019: *15 demerits* for booking sick on February 23, 2019

[16] The Company filed into evidence the Grievor’s employment data, which demonstrated the Grievor had booked off sick for multiple days in the Fall of 2018, as well as days in April, July, September and October of 2019. However, it did not place that information into any context.

[17] For example, the Company did not offer any evidence regarding the rates of “booking sick” among its employees, to demonstrate that the Grievor’s overall record was worse than the average; or demonstrate he had been subject to an attendance management program as a result, which he had breached. While the Grievor was off multiple days from September 4 to early December in 2018, for example, he does not appear to have been investigated for any of those absences.

[18] The Company did not offer any evidence that the Grievor was *not* sick with a sinus infection on the October dates. Neither did the Company request any medical documentation to verify the Grievor’s illness at that time.

Arguments

[19] The Company argued that when the Grievor booked sick for the three days in October of 2019, he violated the T&E Availability Standard. It noted that Availability Standard provided for an “attendance review” when an employee books sick on “two or more” available work days. It argued that a “reasonable response” for a sinus infection would be to seek a diagnosis and treatment from a medical professional to address the infection,

which the Grievor did not do. The Company relied on the Grievor's discipline record. It argued the Grievor has received a total of five assessments of discipline over five years, and three of those related to booking sick.

- [20] Given this evidence, the Company argued the Grievor's culpability was established.
- [21] Regarding the appropriateness of the discipline assessed, the Company argued the discipline was not excessive, and that both mitigating and aggravating factors were appropriately considered, as well as the concept of progressive discipline. It argued the discipline was consistent with its Hybrid Discipline Policy.
- [22] It argued that with his time off for being sick, the Grievor was off for almost five days, between his deadhead home on October 14, 2019 and his next call for service. It relied upon the Grievor's disciplinary record to demonstrate that for seven years previous to this discipline, the Grievor's attendance at work has been previously addressed on numerous occasions. Its position was that booking sick was not a "rare" occurrence for this Grievor, and that the Company has dealt with the Grievor "less severely" on multiple occasions, all of which proved "unsuccessful" in changing the Grievor's behaviour.
- [23] On that basis, it argued the Company's response was just and appropriate. It argued the Company applied a progressive disciplinary approach, increasing the level of demerits to 20 demerits. It further argued this response was consistent with its disciplinary guidelines.¹ It argued the facts of this situation were aggravating, as the Grievor was not a long service employee and this action was part of a "concerning pattern of violations", which supported the Company's response.
- [24] The Union argued the Company bears the burden for establishing the Grievor was not sick with a legitimate illness, which it has not met in this case. It also argued the Investigation was not fair or impartial.
- [25] It argued the unchallenged evidence of the Grievor was that he was sick with a sinus infection, which was a *bona fide* illness. Its position was that the jurisprudence has established that individuals cannot be punished for being unfit to work, and that there is

¹ The Hybrid Discipline and Accountability Guidelines; currently under Grievance.

no presumption, as discipline must only flow from evidence, rather than from speculation or suspicion. As a result, it argued there is no basis for discipline at all in this case.

- [26] The Company pointed out that at no time did the Company challenge the veracity of the Grievor's illness, and how it impacted his ability to work safely. Neither did it request a medical assessment or medical documentation. The Union argued there is no presumption of culpability and that the only conclusion is that there is no just cause for discipline in this case. The Union filed the Grievor's September 2019 Investigation transcript to demonstrate that the Grievor gave the same evidence in September of 2019 regarding his sickness with a sinus infection, but he was not disciplined for that booking off sick. It argued that incident was the same incident as this one, yet the Grievor was disciplined. It argued this demonstrated the discipline was not just or appropriate.
- [27] In Reply, the Company objected to the Union's use of the September Investigation transcript and Investigation as being outside of the scope of the Joint Statement of Issue and the Union's position in that document, so it argued that evidence should be disregarded. It also noted the lack of specifics in the Union's position regarding the Investigation and maintained it was fair and impartial. It argued that with a seasonal allergy, there should have been a recurring pattern of illness during the Fall season. It also distinguished the Union's jurisprudence.
- [28] In Reply, the Union argued that the Informal Handling which was referenced by the Company was more than one year prior, and that it was not appropriate to refer to these incidents: Article 39.11. It further argued the Grievor was not off for three days, but for 2 days and 15 hours. It argued this is significant, as the Company has relied on the Grievor's absence being three days to justify its Investigation under the T&E Availability Standard. It further argued there was no pattern established and the Grievor's illness was *bona fide*, and his right to take this time is protected under the *Canada Labour Code*. It also noted there is no evidence of any negative impact on the Company or other employees from the Grievor's actions. It argued the Company failed to articulate in its submissions why it considered this book off to be culpable. It argued the Grievor's medication of Sinutab does make individuals drowsy. It argued there was no way to verify the Company's claims the Grievor had five days off from booking sick and that this does

not establish culpability. It noted that the Company did not request any medical information regarding the Grievor's illness. It distinguished the Company's authorities.

Analysis and Decision

- [29] A review of the jurisprudence in this area demonstrates several principles:
- a. Discipline must be based on *evidence*. Suspicion and speculation are not forms of evidence;
 - b. When there is a "clear pattern" where the Grievor called in sick in suspicious circumstances, such as just prior to weekends, or going into a vacation period or before or after days off, then that pattern can be considered as one form of evidence; and
 - c. If the Company fails to request medical information or challenge the legitimacy of the illness at the relevant time, that is one relevant factor that can be considered.
- [30] Upon reviewing the submissions and jurisprudence in this area, I am persuaded by the Union's argument that the Company has not met its burden of proof to establish there was cause for discipline for the Grievor's time off sick, on the facts of this case.
- [31] It is therefore not necessary to consider the Union's argument that the T&E Availability Standard was not breached given the Grievor was off for less than three days. Even if the Employer is correct that the Availability Standard was appropriately applied, that Standard did not subject the Grievor to discipline, unless culpability can be established.
- [32] The Union's reference to the September Investigation – for the same illness, with the same answers by the Grievor – was relevant and is appropriately considered. The Union has raised issue in the JSI that the Company has not met its burden of proof to establish culpable behaviour and that discipline was not reasonable or appropriate. That evidence is part of the manner in which the Union is establishing the defence that the Company's discipline was not reasonable. It is relevant that the same answers relating to the same illness did not lead to discipline in September of 2019, but are argued to have established culpability in October of 2019. The relevant question is "why"?

- [33] While the Company argued that it would have been reasonable for the Grievor to seek medical treatment for his sinus infection, it did not seek or request any medical information or validation of the Grievor's sickness when he called in sick. Not having sought that information at a point in time where it could have been provided, it cannot rely on its absence at this late date to establish culpability. The Grievor does not have to demonstrate he *was* sick. The Company must demonstrate he was *not*, to demonstrate his absence was culpable.
- [34] The Grievor's evidence was that this was not an unusual illness for him, and he found it effective to take OTC medication. It is not clear how that is not a reasonable response, or how that answer supports culpability.
- [35] The Company argued there should have been a pattern of illness in the Fall if the Grievor's illness was seasonal. A review of the Grievor's attendance record demonstrates there were several days of sick time booked off by the Grievor in the Fall of 2018, which was consistent with the seasonal nature of this illness.
- [36] Neither do I find a 'clear pattern' in the Grievor's record or on these facts that would convince – on a balance of probabilities – that the Grievor did not appropriately book off sick in October of 2019 and his behaviour was therefore culpable.
- [37] The fact that the Grievor was off for five days total in this case – with 3 being ill – is not evidence of a "pattern" such as that referred to in **AH750**. His record does not show such a pattern, either. It is not therefore necessary to determine the issue the Union raised regarding the Informal Handlings.
- [38] I cannot agree with the Company's conclusion that if an individual with multiple absences which do not establish a pattern then books sick, they are culpable and liable to be disciplined. That is not only logically troublesome – as it ignores the reality of various viruses in our society which can make a person ill - but it would also result in the Company violating the *Canadian Human Rights Act*² for discriminating against an individual on the basis of disability.

² RSC 1985, c. H-6, as amended

[39] Like the Arbitrators in **CROA 4630; 4524; AH750** and **CROA 4757**, I am drawn to the conclusion there is no evidence the Grievor did not suffer from a *bona fide* illness when he booked sick on October 16-19, 2024.

[40] The comments made in **CROA 4757**, are also appropriately stated here:

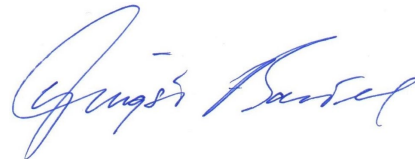
I am unable to find that Mr. Carron inappropriately booked off sick. Consequently, While I understand the complexity of the 24/7 operations and the importance of attendance management, there is simply no medical evidence to persuade me that Mr. Carron mischaracterized the absence from work and should have been disciplined for culpable absences³.

[41] As no cause for discipline has been established, the Grievance is upheld.

[42] The Company is directed to remove the 20 demerit discipline assessment from the Grievor's disciplinary record.

I remain seized to address any issues arising from the implementation of this Award. I also remain seized to correct any errors and to address any omissions, to give it the intended effect.

July 26, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**

³ At para. 9.