SHP 721

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY LTD. (CP)
(hereinafter the "Employer")

AND

UNIFOR LOCAL 101R
(hereinafter the "Union")

STACEY PARTRIDGE SUSPENSION GRIEVANCE

ARBITRATOR: Tom Hodges

FOR THE EMPLOYER: Dave Guerin, Director, Labour Relations
David Pezzaniti, Labour Relations Officer
Shelley Smith, Labour Relations Officer
Deanne Cote, Labour Relations Officer

FOR THE UNION: Brian Stevens, National Representative
Nelson Gagne, President
Gerard Emond, Vice President, Atlantic
Karine Desjardins, Vice President, East
Tom Murphy, Former President
Derrick James, Former Vice President, East

HEARING: June 29, 2015

AWARD: October 18, 2015

AWARD

JURISDICTION

The parties agree that this arbitrator has the jurisdiction to hear argument in this dispute and render a decision accordingly, pursuant to the terms of Rule 29 of the collective agreement.

BACKGROUND

The grievor, Mr. Stacey Partridge is a Rail car mechanic who began working at CP Rail on March 20, 1989. On July 22, 2014, he arrived late for his shift and as a result worked just six hours that particularly day. Following an investigation, the employer determined that the grievor had claimed eight hours instead of the six he worked and imposed a 30 day unpaid suspension. The disciplinary suspension was subsequently grieved by the union on behalf of the grievor, on August 27, 2014.

Similar to the fact in SHP 720, the underlying this grievance is an overarching and ongoing dispute between the parties since early 2013, over the employer's recent change in assessment of disciplinary penalties to bargaining unit members. This has resulted in a backlog of several hundred unresolved grievances being generated over the last two years, due in large part to an apparent change in approach by the employer relating to discipline, and the accompanying use of unpaid suspensions as a disciplinary response. The employer admittedly, has previously relied primarily on the Brown System of assessment and accumulation of demerit points as the means of addressing employee misconduct. However, on February 27, 2013, Mr. Guido Deciccio, Senior Vice President for Canadian Operations, wrote to Mr. Tom Murphy, Local 101R President:

> Dear Mr. Murphy and Fellow Employees,
>
> I have previously shared my concerns regarding the handling of productivity and safety issues. I write to you today to inform you of a change concerning the application of disciplinary assessments at Canadian Pacific Railway.
>
> We continue to have preventable accidents and injuries. These incidents can be directly attributed to carelessness and complacency. Numerous employees have become involved in repeat offences.
>
> Since December 1, 2012, there have been 50 run-through switches, 7 movements travel over a derail, 7 failings regarding the proper protection of moving equipment and 28 rule violations. In summary, we have experienced 210 train accidents, excluding crossing incidents, 10 of which are FRA reportable. This is not acceptable. Despite sharing my previous concerns and our increased focus on safety, some employees are unwilling, or unable, to carry out their duties safely and productively. While we are going to further increase our coaching, proficiency testing and train rides to ensure that work is being carried out safely,

the mere assessment of demerits has proven to be unsuccessful in bringing about a positive improvement in the accident and injury trends.

Consequently, we have no choice but to begin to use unpaid suspensions as part of our discipline policy to change at risk behaviors.

We will judge each case on its own merits and use suspensions as appropriate. A Director of Labour Relations will contact you to discuss how suspensions will work.

If you have any questions, please do not hesitate to contact me.

Mr. Murphy responded to Mr. Deciccio that same day:

Dear Mr. Deciccio and staff

The union acknowledges receipt of your email and the letter attached that has already been posted in the facilities and we recognize the company's knee jerk reaction as simply that.

In reply to your letter we state the following.

We do not accept the unilateral introduction of unpaid suspensions either in conjunction or independent of the long standing Brown System utilized in the industry and will reserve our right to challenge the imposition of discipline on a case by case basis.

Our members are not complacent on the job.

On the contrary they are working under the stresses of being punished to the extreme and held out of service or fired for the smallest of issues at the whim of every supervisor available.

This is the real issue at hand. Not complacency.

You mention the number of incidents since December 2012.

It is funny how that date correlates significantly with the timelines of heavy handed discipline brought down by the company in its new effort to control the culture of company workers.

This discipline is not acceptable to us as we feel that this endangers our members even further.

In the meantime, we will continue to support any positive initiatives that will continue to build our members passion for service and reliability.

It is regrettable that once again the company's intentions are to attack our members and employees generally across the organization, rather than get to the real issues like respect and a workplace free from fear and abuse.

During the period of time since this exchange, there have evidently been a significant and unusually high number of unpaid suspensions meted out by the employer to its employees represented by Local 101R.

The suspensions and terminations since the February 27, 2013, letter from Mr. Guido Deciccio, to Mr. Tom Murphy are part of what is generally regarded as an initiative to change the culture at CP Rail. A more detailed historical background to this underlying matter can be found in SHP 720.

EMPLOYER POSITION

The employer argues that the grievor's actions were fairly and impartially investigated. The employer determined that the grievor had claimed eight hours work when he had only worked six. The employer also maintained that the grievor had not received permission to make up the two hours that he was late. It did not accept the grievor's excuse of forgetfulness in submitting the claim for eight hours.

The employer maintained that the grievor fraudulently and deliberately recorded his time by claiming eight hours of wages for just six hours of work on July 22, 2014. The employer also did not accept the grievor's explanation that he forgot to amend the errant time entry or that there was no intent on his part to deceive. The employer noted that on a shift the next day he made no attempt to correct his error. The employer further argued that on balance this was not just a simple error, and that the grievor should have been acutely attuned to such details and procedures given past disciplinary record. It is submitted that the Grievor's evidence is consistent with the probabilities that surround the circumstances.

In determining the appropriate discipline to be assessed the employer argues that his previous employment history weighed heavily on the decision to suspend the grievor. During his career, the grievor had previously been cautioned for absenteeism and also been assessed forty demerit marks. Ten of those demerits were for leaving work early. Most serious was the assessment of 20 demerits for failure to provide Blue Flag Protection thereby placing fellow employees at risk. He had also been dismissed previously on two occasions. Most recently in 2009 he had been dismissed and later reinstated in connection with fraudulent submission of time claims.

In reply to the union's position with respect to the use of suspensions, CP argues that they are a legitimate management right and recognized as a disciplinary penalty in Rule 28. Rules 28.4 and 28.5 of the collective agreement:

> **28.4** When discipline is recorded against an employee, he/she will be advised in writing and will acknowledge receipt. In cases involving the assessment of discipline a copy of the written advice (form 104) shall be supplied to the duly authorized local representative. In the event a decision is considered unjust, appeal may be made in accordance with the grievance procedure starting by an appeal to the officer who issued the discipline. Grievances concerning dismissal, **suspension**, demerit marks in excess of 30 demerits,

or demerits that result in dismissal for an accumulation of demerits and restrictions may be initiated at the final step of the grievance procedure (emphasis added).

In cases of dismissals or other termination of employee relationships, the Company shall provide the Regional Vice-President of the union a copy of the advice given the employee along with a letter outlining the reasons upon which the decision to terminate was based. Time limits for progression of a grievance under the provisions of Rule 28.8 shall begin with the date of such advice.

28.5 If it is found that an employee has been unjustly suspended or discharged such employee shall be reinstated with full pay for all time lost. In the event of an employee being otherwise employed pending settlement of his/her case by reinstatement any pay earned will be credited against time lost (emphasis added).

Further, the employer argues that it has gradually blended a demerit and suspension based approach to discipline since early 2013. The employer maintains that it had advised all union representatives of this approach. The suspension based approach has been increasing in consistency since it was first introduced.

The employer argues that this change in approach to the assessment of discipline is justified given that employees work in safety sensitive and safety critical position. These employees work in often unsupervised situations and must be held to a higher level of accountability than in the past. All of these factors including the safety and productivity issues raised in CP's Senior Vice President Deciccio's letter of December 1, 2013, have served to warrant a change in approach to assessing discipline. Recent railway accidents and particularly Lac Megantic have increased the scrutiny under which railways operate and have created a new reality. The employer maintains that there is no written policy regarding assessment of disciplinary penalties. The change is within its management right and reasonable chance to meet a legitimate operational requirement given the current situation.

UNION POSITION

The union argues that the grievor asked his supervisor if he could make up the time at a later date, and admittedly did not receive a definitive response. He nevertheless entered the full eight hours of his regular shift into the employer's timekeeping and payroll system, ostensibly on the understanding that he would make up the unearned two hours at some point. In point of fact this never did happen, and the grievor alleged that he simply "forgot" to adjust his time entry accordingly.

The union further argued that the employer has mechanisms in place to approve or "red light" improper time entries so that employees can correct them after the fact. As a result, the union maintained that the 30 day suspension was excessive in nature. In addition, the union asserted that the investigation was not fair and impartial as the investigating officer declined to investigate a discrepancy in SAP data screen profiles when brought to his attention. This, in their view, rendered the investigation unfair as the new evidence was not introduced nor pursued. The union requested that the arbitrator allow the grievance and direct the employer to expunge the 30 day suspension from the grievor's work record, and make him whole in all aspects of wages, vacation and pension.

The grievor's representative stated that based on the evidence the employer has not met its onus of proving its allegations on the standard of clear, cogent and convincing evidence. Given the employer's change in policy towards severe penalties the onus of proof must also be elevated. In addition, the union argues that given the higher standard of accountability being espoused by the employer, a similar higher standard must be given to employees' rights to a fair and impartial hearing, protection of collective agreement requirements relating to timelines and production of documents necessary to the investigation process.

The union took the position that the employer was required by reason of the nature of the allegation to meet a high standard of proof of the facts upon which it relied. The more serious the alleged misconduct and the more serious the penalty, the more stringent the standard of proof that is required to be satisfied. If the employer is to claim a higher standard for employees in a safety sensitive position a higher standard must be applied to employees' rights embedded in the collective agreement and responsibilities of the employer in the assessment of discipline.

The union does not dispute the employer's right to implement workplace policies, but they are subject *KVP* test in *Lumber and Sawmill Workers Union Local 2537 and KVP Co. Ltd.* The union argues that the employer has failed to make employees aware of the policy shift resulting in employees not being aware of the severity of discipline which may flow from an alleged rule violation. Further the rule is not being consistently enforced. The union argues that the same offence can result in demerits, deferred suspensions or suspensions of significant duration. The union argues that the use of suspensions is not clear to employees and is not unequivocal.

DECISION

In *William Scott & Co. v. C.F.A.W., Local P-162* (1976), [1977] 1 C.L.R.B.R. 1 (B.C. L.R.B.), the B.C. Labour Relations Board set out a three part test for arbitrators assessing discipline/discharge cases. First, does the Grievor's conduct give rise to some form of discipline. Second, if the answer is "yes", was the discipline issued excessive, having regard to all of the circumstances surrounding the situation. Third, if

the answer to question 2 is "yes", then what measure of discipline should be substituted as just and reasonable.

While Chairman Weiler in *Wm. Scott* supra discussed this issue in the context of a discharge case, his findings have been found by arbitrators to be just as applicable in cases of lesser discipline. In determining whether the penalty imposed by the employer was excessive or inappropriate he adopted the findings in *Steel Equipment Co. Ltd.* (1964) 14 L.A.C. 356 at pages 40-41 by noting:

> 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.

The union has argued that if the employer is to hold its union members to a higher standard due to their employment in a safety sensitive position, an equally higher standard must be placed upon the employer in the assessment of discipline. Unifor submits that a higher standard for the employer is also appropriate

given the increased severity of penalties being assessed. The arbitrator finds merit in the rational put forward by the union. Similarly, there is merit to the union's argument that rights contained in the collective agreement requiring specific time limits cannot be ignored. Investigation procedures are designed to ensure the right of an employee to a fair and impartial investigation.

However, regarding the particular matter at hand, the arbitrator is of the view that some form of discipline is warranted. In assessing whether the discipline assessed is too severe a number of factors set out in *William Scott* supra are significant. The grievor, is a Rail Car Mechanic with substantial service. However, the incident giving rise to the discipline is not isolated. The grievor has a checkered discipline record, including two instances of dismissal and subsequent reinstatement, the latter of which in 2009 involved the submission of fraudulent overtime claims. In 2011 he received a caution for excessive absenteeism, and the following year was assessed 10 demerit marks for leaving work without authorization. The seriousness of the incident is compounded by the fact that it is a repeat offence. It was not spur of the moment and the grievor knew or ought to have known the consequences for the false claim.

The greivor should have relied on his own memory in claiming the appropriate time for hours worked. Given his previous discipline record he should not have had to rely on a prompt from any other extraneous source, electronic or otherwise as argued by the union. He should have inputted just six hours of work for July 22, 2014, and if offered the opportunity to make up the lost two hours at a later date, so be it.

In view of all of the foregoing the arbitrator the grievance is denied.

I remain seized should there be any dispute with respect to any aspect of the interpretation, enforcement or implementation of this award.

Dated this 18th, day of October, 2015

Tom Hodges
Arbitrator