

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the “Employer”)

AND:

UNIFOR LOCAL 101R

(the “Union”)

(Timothy Highton Dismissal – Grievance No. 204-2019-014;  
CAN-CP-UNIFOR-2019-00007818)

ARBITRATOR: Vincent L. Ready

COUNSEL: Sharney Oliver  
for the Employer

Jim Wiens  
for the Union

HEARING: December 3, 2020  
Virtual hearing

PUBLISHED: February 16, 2021

The parties agreed I was properly constituted as an arbitrator under the terms and provisions of the Collective Agreement with the requisite jurisdiction to hear and determine the matters in dispute.

This matter pertains to a grievance filed by the Union arising from the Employer's dismissal of the grievor, Timothy Highton, from his employment as a Locomotive Mechanic at the Employer's locomotive repair facility in Moose Jaw, Saskatchewan. The grievor's employment was terminated on May 2, 2019 for "inappropriate use of company electronics" and for "sleeping in the cab of CP9724 while on duty on April 11, 2019." He had worked for the Employer for approximately twelve years prior his dismissal.

The Union filed a grievance at Step II on May 26, 2019, alleging the Employer's the investigation into the grievor's conduct was not fair or impartial, the grievor's right to union representation was violated, and his medical issues ignored by the Employer.

## **FACTS**

The parties each filed their own Ex Parte Statement of Issue, both of which are reproduced below.

### **Employer's Statement of Facts**

On April 11, 2019, the Grievor was found by supervisor Abhishek Raj to be asleep in a locomotive along with a tablet playing a YouTube video.

On April 15, 2019, the Grievor participated in a formal statement on the matter.

On May 2, 2019, the Grievor was dismissed from work. A grievance was filed claiming the dismissal was excessive and the investigation was not fair or impartial.

On July 2, 2019 the Grievor was unilaterally reinstated by the Company and returned to work on July 21, 2019.

### **Union's Statement of Facts**

On April 11, 2019, the Grievor was in a locomotive within the Moose Jaw locomotive repair facility when he was found to be asleep by supervisor Abhishek Raj and a tablet was playing a YouTube video.

The Grievor provided a written account of the matter and was subsequently held out of service by Assistant Superintendent Rob Khoury pending a formal statement.

A formal statement was held on the matter on April 15, 2019, with Assistant Superintendent Khoury as the investigating officer.

The Grievor was dismissed from work on May 2, 2019. A grievance was filed claiming the dismissal is excessive and the investigation was not fair or impartial.

On July 2, 2019 the Grievor was offered a leniency agreement. He accepted the agreement and returned to the workplace on July 21, 2019.

### **POSITIONS OF THE PARTIES**

#### **Position of the Employer**

The Employer asserts the discipline was warranted and that the grievance ought to be dismissed. It submits the grievor was working in a "unique" position of trust when he was discovered sleeping for five minutes in the cab of a locomotive while "non-work related videos" were playing on the grievor's company-issued tablet. Since he admitted to his misconduct, the Employer states that the only issue to be decided in this case is whether dismissal was warranted in these circumstances.

The Employer notes that sleeping on duty is a “conduct unbecoming offence” that may warrant suspension or dismissal as set out in CP’s “Hybrid Discipline and Accountability Guidelines.” It relies on several arbitral decisions to argue that the severity of the discipline in this case is in line with similar cases. The Employer notes the grievor was “unilaterally reinstated” on July 2, 2019, less than three months after being dismissed.

The Employer disputes that the grievor has any medical condition requiring an accommodation and points out that the grievor denied being tired or unwell at the time of the incident. The Employer objects to the Union raising concerns about the fairness of the investigation, stating that such assertion is untimely since no such concern was raised at the time of the investigation. Further, the Employer refutes the Union’s contention that the grievor was unrepresented during the investigation into his misconduct, asserting he was assisted by a “duly authorized representative” and that this representative did not raise any objections to the process of the investigation.

### **Position of the Union**

The Union submits the discipline in this case was excessive. While it does not dispute the grievor fell asleep on the job, it stresses this misconduct was unintentional and notes the grievor nodded off for fewer than five minutes. On this point it points to the fact that the tablet being used by the grievor was set to go into sleep mode after 1-5 minutes of inactivity and notes the device had not “timed out” by the time the grievor was discovered asleep. With respect to the allegation the grievor was misusing electronics, the Union contends the tablet being used by the grievor was playing “background music” when he fell asleep – which it contends is an accepted ancillary use of the device. In addition, the Union notes the grievor was honest and contrite in the Employer’s investigation.

The Union takes issues with the fact that the grievor was not provided Union representation throughout the disciplinary process, nor was it notified, consulted or present when the Employer subsequently negotiated the grievor's reinstatement in July 2019. According to the Union, the Employer's conduct in this regard constituted bad faith conduct. The Union relies on the Collective Agreement, the *Canada Labour Code* and arbitral jurisprudence to support its assertion that the Employer acted improperly by dealing directly with the grievor in the absence of the exclusive bargaining agent.

The Union further challenges the impartiality of the investigation, taking aim at the fact that the Assistant Superintendent of Locomotive Maintenance, Rob Khoury was a witness to the incident and also acted as the "investigating officer". It notes there are a number of supervisors at the Moose Jaw facility who could have conducted an investigation more impartially. The Union cites case law to support its contention a witness to misconduct should not also investigate that misconduct where there are other supervisory personnel available to do so.

The Union also objects to the fact that the Employer did not file a response to the Step 2 grievance until July 19, 2019, in violation of the 35-day timeline set out in Rule 28, and after the Employer had already negotiated a reinstatement deal directly with the grievor without the Union's knowledge or involvement. The Union further objects to the fact that the Step 2 response relies on a violation of the Electronic Device Policy, when the Union states that the April 15, 2019 investigation did not raise this as a concern. The Union submits that the Employer is "piling on" further alleged misconduct to bolster its decision to dismiss the grievor.

The Union submits that when all of these factors are considered – including that the discipline exceeds the Employer's normal practice of issuing

demerit points for the similar misconduct – the dismissal of the grievor was excessive. The appropriate remedy, the Union submits, is a declaration that the termination is void *ab initio*; direction that all records relating to the discipline be expunged from the grievor's record; compensation for wages with interest, benefits, and all pension, vacation and service credits from the date of termination; and damages for the bad faith manner of dismissal. In the event I find some measure of discipline was warranted, the Union proposes I substitute discipline at the lower end of the range between a caution and 25 demerit points.

## **DECISION**

As a starting point, it must be noted that as exclusive bargaining agent for the employees of the Employer, the Union has the right – and obligation – to represent members throughout the disciplinary process. That said, however, I observe that the Union in this case was advised of the Employer's decision to reinstate the grievor, and agreed this was appropriate. Indeed, it was the very remedy sought by the Union in respect of the grievance, and was an appropriate mitigation by the Employer in my view.

With respect to the merits of the grievance, I find termination to be an excessive disciplinary response when all of the circumstances are considered. While sleeping on the job is certainly serious misconduct which will warrant a disciplinary response in most cases, I accept that the grievor's misconduct was unintentional and inadvertent, and that he was forthright during the Employer's investigation. Further, I observe that he has been gainfully employed since his reinstatement in July 2019 – which indicates lesser discipline sufficiently addressed this behaviour. I therefore order that the termination be substituted with an unpaid suspension until the date of his return to work (July 21, 2019). No back wages or other compensation are payable to the grievor as a result of this Award.

The grievance is allowed. It is so awarded.

This award is issued pursuant to the arbitration provisions of the Collective Agreement (Rules 29.1-29.7).

Dated at the City of Vancouver in the Province of British Columbia this 16<sup>th</sup> day of February, 2021.



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Vincent L. Ready