CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4340

Heard in Montreal, October 16, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

1. Disciplinary assessment of 10 demerits assessed to Locomotive Engineer Richard McKinney of Revelstoke, B.C., on June 26th, 2012.

2. Appeal of the 20 Demerits issued to Locomotive Engineer R.G. McKinney.

3. Appeal of the 30 Demerits and termination of Locomotive Engineer R.G. McKinney.

JOINT STATEMENT OF ISSUE:

1. Mr. McKinney was formally investigated regarding his attendance during the period from May 17th, 2012 to June 7th, 2012. After the investigation was complete, Mr. McKinney was assessed 10 demerits for "Reporting sick after being provided a Personal Leave, sick for the weekend prior to the commencement of scheduled Annual Vacation and failing to return calls from a manager when off sick and for reporting sick after being held out of service, and failing to advise a manager of your absence in a timely manner; May 17th to June 7th, 2012, Revelstoke B.C.".

The Union contends that Mr. McKinney's absences were due to his well-documented medical condition which he has suffered through his entire career and that therefore, his absences were non-culpable. The Union contends that the Company failed to meet its burden of proof necessary to support discipline, and that by assessing him with 10 demerits, the Company was in violation of the Canada Labour Code and Human Rights Legislation. The Union requests that the 10 demerits assessed to Locomotive Engineer McKinney be removed from his record and that he be made whole for all lost wages in relation to time withheld form service.

The Company disagrees with the Union's contentions and denies the Union's request.

2. Following an investigation, Engineer McKinney was issued 20 Demerits on February 17, 2013 for "failing to meet your employment obligations as evidenced by your unacceptable absenteeism November 15, 2012 to February 11, 2013 while employed as a Locomotive Engineer, Revelstoke, B.C."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Locomotive Engineer McKinney be made whole.

In the alternative, the Union contends the Company has failed to establish culpable behaviour on Mr. McKinney's part during the period under review and that 20 demerits is an excessive and unwarranted penalty in the circumstances.

The Union requests that the discipline be removed in its entirety, that Engineer McKinney's record be adjusted accordingly and that he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions and denies the Union's request.

3. Following an investigation, Engineer McKinney was issued 30 Demerits on April 16, 2013 for "failing to ensure your train was operated in a safe and effective manner as evidenced by your movement exceeding authorized speeds on the crossover at KC Junction mile 37 and for excessive speed on the descending Heavy Mountain Grade between mile 104.5 and mile 105.5 and failing to make an emergency brake application when your movements exceeded the maximum allowable speed by 5 mph; a violation of CROR General Rule A (i) (iii), (iv), (viii), CROR Rule 106, CROR Rule 33, CROR Definition - Medium Speed, Time Table 4 1 Footnote Item 4.3 and 11.10, while working as a Locomotive Engineer on train 353-037 on March 10, 2013 on the Mountain Subdivision." On the same date Engineer McKinney was dismissed for "accumulation of demerit marks under the Brown System of Discipline."

The Union contends that Engineer McKinney's dismissal is unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter.

The Union requests that the discipline be removed in its entirety, that Engineer McKinney be ordered reinstated into the position of Locomotive Engineer without loss of seniority. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit,

The Company disagrees with the Union's contentions and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Able	**(SGD.) A. Becker**
General Chairperson	**Labour Relations Officer**

There appeared on behalf of the Company:

M. Moran	– Labour Relations Officer, Calgary
B. Medd	– Labour Relations Office, Calgary
M. Jackson	– Superintendent, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Revelstoke
L. Darby	– Local Chairperson, Revelstoke
R. McKinney	- Grievor, Revelstoke

AWARD OF THE ARBITRATOR

The grievor's disciplinary record stood at 15 demerits prior to the first of the three incidents now before me. Between the first and second incidents, the grievor admitted responsibility for reporting late for duty resulting in a train delay. Ten demerits were added to the grievor's total demerit points bringing his total demerits to 35 demerits. The issuance of 20 demerits relating to the grievor's alleged unacceptable absenteeism raised his demerits 55. With the Company's assessment of 30 demerits for twice exceeding the permissible speed on March 10, 2013, the grievor was discharged on April 16, 2013 for an accumulation of demerits.

Incident 1

In determining whether the Company was justified in imposing discipline for reporting sick, there is no dispute that grievor has a back problem, which condition has resulted in him taking time off work. The Company has been aware of the grievor's back condition for years and has never disputed its legitimacy.

Following an approved personal leave day on May 16, 2012, the grievor booked off sick on May 17, 2012 at 19:21 hours missing a scheduled trip. He remained off sick for the following two days, May 18 and May 19, 2012.

The record reveals that the grievor's superintendent ("Superintendent Schumacher") tried to contact the grievor on May 19, 2012, at approximately 14:00 hours. The grievor did not pick up, nor did he return the message Superintendent Schumacher left for him.

The Company withheld the grievor from service from May 20, 2012 through June 1, 2012. The grievor was on vacation commencing May 22, 2012. The bargaining unit was on strike from May 22, 2012 through May 31, 2012.

Superintendent Schumacher spoke with the grievor on June 1, 2012. He asked the grievor why he had been off work between May 17 and 19, and the grievor told him that his back had been really sore. The grievor had not gone to see his doctor. He explained that he had medication at home his doctor had previously prescribed and that he had used it at the time.

When Superintendent Schumacher asked the grievor why he had not returned his May 19, 2012 call, the grievor answered that he did not pick up messages from his home phone. The investigation revealed that Supervisor Schumacher did not call the grievor's home phone number. In the grievor's investigative statement, he explained that Superintendent Schumacher had called a cell phone that the grievor had purchased approximately 6 months earlier. The grievor stated that that phone did not have voice mail "that he was aware of." The grievor did acknowledge that it was his responsibility to ensure that the CMA had up to date and accurate contact information.

On June 1, 2012, after speaking with Superintendent Schumacher, the grievor was returned to duty. The following day, at 21:32 hours the grievor booked off sick. The Company withheld the grievor from service from June 3 through to June 7, 2012.

On June 4, 2012, Superintendent Schumacher called the grievor to follow up on why he had booked off sick on June 2, 2013. During that phone conversation the grievor graphically explained his symptoms to Superintendent Schumacher. In his statement, the grievor stated that when he spoke to Superintendent Schumacher, he told him that he had already called the doctor's office in an attempt to set up an appointment. He was unable to get in to see the doctor on June 4th, 2012 but did get in on June 5, 2012 obtaining a Functional Abilities Form ("FAF") as required. The grievor had "gastritis."

Incident 2

On November 15, 2012 the grievor booked off sick at 19:26 hours. He booked back on the following afternoon. Between December 6 and 16, 2012, the grievor was off on his scheduled vacation. On December 23, 2012, the grievor took an earned day off ("EDO") and was approved a personal bridge to his EDO from the day before. The grievor booked back on at 08:00 hours on December 24, 2012, but then booked off sick (unfit) on both December 25 and 26, booking back on December 27 at 13:26 hours.

On January 7, 2013, the grievor booked off sick (unfit), and remained off sick on January 8, 2013. On January 9, 2013 the grievor was off work due to on off-duty injury for which WIB benefits were paid through January 15, 2013. On January 19 the grievor booked off sick at 03:26 hours, booking back on the following day at 15:26. Finally, the grievor booked off sick February 8, 2013 at 23:16 hours through February 11, 2013 at 12:24 hours.

Unlike the May 2012 absences, which the grievor attributed to his back problems, he asserted that the reason for his absences in Incident 2 (except for the off-duty injury absence) was because he was sick or was not feeling well enough to go to work.

In particular the grievor was asked about his reasons for having booked of sick (unfit) on December 25 and 26, and booking back on December 27, 2012. The grievor answered that he “was unable to prepare for work.” In the result, by booking off Christmas and Boxing Day the grievor had 25 days off without interruption as the Company pointed out. The record reveals that the grievor was available to work, however, between December 17 and 22 as well as on December 24, 2012.

Decision – Incidents 1 and 2

In respect of the grievor's absences in incident 1, the discipline imposed concerns his having reported sick on the evening of May 17, 2012 through May 19, 2012 and again on June 2, 2012.

The Union alleges that the investigation was impartial. In asserting its position, and seeking to void the discipline, the Union relies on one question that the investigator asked the grievor. That question was whether he had booked time off after taking a personal leave day on May 17, 2012, to extend his time off. The grievor told the investigator that that was not the case and that he took the time off because his back was sore.

The question was asked because the Company suspected that the grievor's sicknesses in May and June were not legitimate. The investigation was undertaken, as cases are normally, because the Company had some reason to believe that misconduct may have taken place. Contrary to the Union's contention, the question is not a leading one and does not offend against the general rule that questioning remain open ended in a manner such as to reflect general impartiality and withholding of judgment.

With respect to the sick days related to the grievor's sore back, there is no question that the grievor has back problems – which he has had for some time. The grievor's decision to take the medication his physician had previously prescribed for him, rather than go to see him is not unreasonable. The combination of the grievor's failure to have returned his manager's call that he says he missed and the fact that the griever took a personal day on May 16, 2012 does not, to the requisite standard, prove that the grievor was falsely reporting sick. I appreciate that the Company had its doubts.

Similarly, the grievor booking off sick the day after he had spoken with Superintendent Schumacher on June 1, 2012, does not, on the record before me, demonstrate that the grievor was not suffering from gastritis.

The Company relies on the grievor's failure to have contacted his manager to provide updates when he was off sick as one piece of a larger puzzle that leads it to doubt the legitimacy of the grievor's having booked off sick. The Union says that no calls were required. While that may be the case, it would assist, however, in assuaging the not entirely unreasonable Company doubt about the legitimacy of the grievor's illnesses. I take it from the grievor's investigative statement that the grievor now appears to appreciate that point.

To summarize, while the Company may have had some reason to doubt the legitimacy of the grievor having reported sick for the days at issue, in this case, for the reasons referenced herein, I am unable to find that the Company has proven that the grievor inappropriately took sick leave.

Accordingly, I accept the submission of counsel for the Union that the grievor was effectively disciplined for being sick in this case, contrary to section 239 (1) of the *Canada Labour Code*:

> 239(1) subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of an absence due to illness or injury.

With no just cause for the assessment of discipline against the grievor, the 10 demerits issued against him are to be stricken from his disciplinary record.

I turn now to the Company's assessment of 20 demerits for alleged unacceptable absenteeism for the period between November 15, 2012 and February 11, 2013.

The grievor's annual vacation, and approved personal bridge to his earned day off on December 23, 2012 are not properly considered in this matter, as they artificially amplify the allegation of "unacceptable absenteeism." These were days the grievor was entitled to be unavailable for work. Their consideration improperly skew's the grievor's availability percentage, which the Company says placed him below the Revelstoke Terminal target availability percentage.

For similar reasons to those set out in incident 1, though the grievor agreed that he did not book off sick related to his back problems during the relevant period, the grievor's unchallenged evidence that he was actually sick when he booked off for one day on November 15, 2012, went off sick for another day on January 7, 2012, did the same on January 19, in addition to booking off sick from February 8 through February 11, 2012. The same holds true for the grievor's absences for the off-duty injury sustained by the grievor for which WIB benefits were paid.

In support of the Company's assessment of 20 demerits the Company relies on **CROA** cases **2845** and **2503**. In **CROA 2845** the grievor, during the four-month period at issue was absent without leave for 21 days and booked off sick without proper documentation and additional 14 times. He also missed three calls. On these facts

alone, **CROA 2845** is factually distinguishable from the case before me. Moreover, in that case the grievor's recent disciplinary record revealed the imposition by the Company of two cautions, and a total of 50 demerits for absenteeism. The grievor's disciplinary record cannot be equated with the grievor's in **CROA 2845**. It reveals that the grievor was last disciplined for unacceptable absenteeism in 2008.

CROA 2503 has even less application to the case before me than **CROA 2845**. In that case, Arbitrator Picher upheld the discharge of a 9-year employee who the arbitrator referred to as a having a pronounced pattern of both innocent and culpable absenteeism. The employee clearly was unable to maintain regular attendance at work. The employee himself recognized his attendance and timekeeping record as "flagrant." In **CROA 2503** the Arbitrator had determined that in the circumstances there was little reason to expect that the grievor's attendance would be substantially better on a go forward basis. The case before me is not analogous and attracts an "innocent absenteeism" analysis.

Notwithstanding the above, I am of the view that the grievor's booking off sick (unfit) on December 25 and 26, 2012 are unsupported absences that warranted a disciplinary response. When the grievor was asked about why had booked off on Christmas day and Boxing Day through to 15:26 hours on December 27, 2012, his answer was that he was "unable to prepare for work." I am not quite sure what that means or how it renders one sick (unfit).

For all of the aforementioned reasons, I am not persuaded that the Company was in a position to assess discipline against the grievor for his alleged “unacceptable absenteeism” for the period at issue, despite his failure to make his target miles of 3500 in each November 2012, December 2012 and January 2012. Reference thereto is to be stricken from his disciplinary record. The discipline is to be substituted with an assessment of 10 demerits for having booked off as sick (unfit) for December 25 and December 26, 2012.

Incident 3 – The facts

The facts are not in dispute. The grievor operated Train 353-037 between mile 35.8 and mile 40 Mountain Subdivision at a speed of 33.1 MPH through the K.C. Junction crossover, when the maximum permissible speed was 30 MPH.

The grievor’s was very much aware that the train was picking up speed when it exceeded the maximum limit. He explained how he handled the situation in the circumstances and why he chose to do what he did to bring the train’s speed down. The grievor did not intend to exceed the speed limit.

On the downhill grade, which had a permissible speed of 20 MPH, the grievor was trying to reduce the train’s speed. At mile 100.433 the train’s speed was 19.2 MPH. By mile 103.844, it had reached 20.9 MPH and was experiencing wheel slips. By mile

104.029 the train's speed was up to 22.2 MPH and by mile 104.506 its speed was 25.6. The train reached a maximum speed of 26.9 MPH before its speed began to drop.

The grievor was aware that the CROR Rule 33 required him make an emergency brake application when the train reached 5 MPH over the permissible speed – at 25 MPH. When the Conductor asked the grievor about putting the train in emergency the grievor told the Conductor that it would not be a good idea given the grade and curvature of the track. The grievor used his extensive judgment to deal with the situation as articulated in the investigation statement. The Company took issue with the rationale behind his choices in the circumstances. As mentioned above, at 26.9 MPH the grievor had the train slowing down.

Of this there is no doubt: the grievor chose to ignore the mandatory Rule, (together with Time Table 41 Mountain Subdivision Footnotes Item 11.10 which is consistent with and reinforces CROR Rule 33) because the thought he was managing the situation appropriately given his 28 years of experience. In the result, the train operated over the maximum speed for a total of two minutes and 22 seconds.

Notwithstanding the Union's submission to the contrary, discipline for the conscious violation of such a serious operating rule is most certainly warranted. The only real question in this case is whether the Company's assessment of 30 demerits is appropriate in all the circumstances.

In submitting that I should not disturb the penalty in this case, the Company refers me to **CROA 690**. While this case exemplifies how a train exceeding the maximum permissible speed can have disastrous consequences, the circumstances of the case cannot be analogized to what transpired in the case before me. The only similarities between this case and **CROA 690** are that the incident in that case took place on the Mountain Subdivision and the maximum permissible speed was the same 20 MPH on the downhill grade.

In **CROA 690**, unlike the matter before me, the grievor attempted to control the train speed without success. More significantly, he allowed the train speed to reach 40 MPH – over double the permissible speed - before he decided to place the train in emergency. The train speed continued to increase and the Trainman riding in the caboose pulled the pin separating the caboose from the rest of the train. He eventually brought the caboose to a controlled stop. The train continued on increasing in speed reaching a maximum of 68 MPH at which point it derailed on a curve resulting in over 5 million dollars damage, but no injuries.

Arbitrator Picher was of the view that the 25 demerits assessed against both the Conductor and Trainman in **CROA 690** was a reasonable assessment of discipline and upheld the Company's assessment against both grievors.

The Company also relies on **CROA 2092**, where Arbitrator Picher reduced a 3-month suspension to 25 demerits when the grievor, a locomotive engineer with 40 years

of discipline free service, exceeded the maximum permissible speed specified by a “slow order” General Operating Bulletin. The Company distinguishes the grievor's 40 years of discipline-free service from the grievor’s discipline record in the case before me.

Finally, the Company relies on **CROA 2501**, where Arbitrator Picher declined to disturb the Company's assessment of 25 demerits for a conductor who was responsible for the over-speed of a train that was traveling almost twice the permissible speed. Arbitrator Picher commented on the fact the movement at issue was in an urban industrial area, which increased the risk of serious consequences in the event of an unforeseen mishap. The Company argues in the case before me that the mountainous terrain and downhill grade increased the risk of a runaway train.

With reference to the grievor’s disciplinary record set out at the outset of this decision, and considering my findings with respect to incidents 1 and 2, the grievor’s record now stands at 35 demerits. I would have to reduce the imposition of discipline in this case to less than 25 demerits for the grievor to avoid dismissal for an accumulation of 60 demerits under the Brown System of discipline.

The Union has not provided any jurisprudence to me where less than 25 demerits had been imposed for speeding infractions. Given that the grievor here did commit two speeding infractions during the operation of his train, and given his conscious decision to ignore CROR Rule 33 as described above, the instant case would

not warrant a departure from the generally established principles with respect to this type of infraction were there no mitigating factors to consider.

At the time of his termination the grievor had accumulated almost 28 years of service with the Company. During those years, he has had a total of 70 demerits imposed against him for operating rules violations. He had an eight-year period where no rules violations were registered against him. Although the grievor has one prior speeding violation for which he was issued 10 demerits in 2006, prior to the matter before me, the most recent discipline imposed for an operating rule infraction was in 2007. The remainder of demerits assessed against the grievor can be liberally characterized as absence or absenteeism related offenses.

On a review of the record as a whole, in my view this is an appropriate case for a substitution of penalty. This grievance is therefore allowed, in part. I direct that the grievor be reinstated to his employment forthwith, without compensation for wages and benefits lost and without loss of seniority. His disciplinary record will stand at 35 demerits.

October 29, 2014

CHRISTINE SCHMIDT
ARBITRATOR