CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4630

Heard in Montreal, April 12, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of 30-day suspension to Locomotive Engineer B. Desjarlais of Kenora, ON, dated January 18, 2016.

THE UNIONS'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Engineer Desjarlais was issued a 30 day suspension described as; "For booking sick on call on Friday, November 20th, 2015; and for booking unfit on 2 separate occasions; Tuesday, August 4th, 2015 & Wednesday, October 7th, 2015, a violation of the Attendance Management Circular #006/14; and as witnessed by your investigation on December 30th, 2015, in Kenora, ON.

The 30 day deferred suspension will be recorded into your work record as such and subject to the following conditions will not be served at this time. In the event you have any incident within 12 months of the issuance of this letter, the discipline noted herein may be activated.

In the event the discipline is activated as an actual suspension you will be required to serve the suspension in addition to discipline that may be associated with any infraction subsequent to the one being assessed herein."

The Union contends that the discipline and subsequent suspension assessed to Locomotive Engineer Desjarlais as a result of the investigation is arbitrary, unfair and not impartial, as there are no guidelines as to what an alleged offence would or should warrant as far as time held off work is concerned. The Union further contends that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. The excessive level of discipline assessed to Engineer Desjarlais most certainly can be considered discriminatory when compared to cases similar in nature. Furthermore the Union asserts that the Company is prohibited from applying discipline under Article 32.01 and the Restoring Rail Service Act of 2012 in this instance. For these reasons, the Union contends that the discipline is null and void and ought to be removed in its entirety.

The Union also contends that the Company has violated Article 23.09 when deferring discipline as there are no provision for deferring a suspension in any instance. It is the further the position of the Union that Engineer Desjarlais was not afforded his rights to a fair and impartial investigation as prescribed by Article 23.04.

For any and all of the above reasons the Union requests that the discipline of a 30 day suspension be expunged from Engineer Desjarlais' work record and he be made whole for all wages lost with interest including benefits in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company denied the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) G. Edwards **(SGD.)**
General Chairman

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary
D. Guerin	– Senior Director, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
H. Makoski	– Senior Vice General Chairman, Winnipeg
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
W. Apsey	– General Chairman, Smiths Falls
M. Wallace	– Local Chairman, Kenora
B. Desjarlais	– Grievor, Kenora

AWARD OF THE ARBITRATOR

Nature of the Case

1. CP imposed a deferred 30-day suspension on Mr. Desjarlais for booking unfit on two occasions and booking off sick on another occasion.

2. The arbitrator agrees with the TCRC that there were no grounds to discipline Mr. Desjarlais for booking unfit. Moreover, the arbitrator agrees that CP's use of deferred

discipline is inconsistent with the language to which it agreed in the collective agreement.

3. For the reasons which follow, and given Mr. Desjarlais' disciplinary record, the arbitrator substitutes a 3-day suspension solely for his improperly booking off sick after receiving a call to work.

Analysis and Decision

Deferred Discipline

4. CP decided to forego using the Brown System which imposed demerit points for disciplinary events. Under the Brown System, employees usually did not suffer any immediate financial loss. However, an accumulation of 60 demerit points would result in termination. Employers could also impose suspensions under the Brown System, sometimes as a last chance measure.

5. The Brown System applied the concept of progressive discipline, but also provided greater guidance regarding the applicable number of demerit points for certain railway industry incidents: CROA&DR 4600.

6. Article 23.09 in the parties' collective agreement deals with deferred discipline. While article 23.09 remains in the collective agreement, it references demerit points under the Brown System. Under article 23.09(5), an employee must agree to any deferred discipline.

7. In CROA&DR 4620, Arbitrator Sims found as one of the reasons requiring intervention CP's imposition of deferred discipline:

> The Union's first point is that this hybrid form of suspension and "suspended suspension" is contrary to Article 23.09 of the collective agreement. The penalty assessed amounts to a form of deferred discipline. Generally, the choice of disciplinary penalty falls to management. However, the parties have chosen to define, by agreement, just when and how deferred discipline may be used. This use does not fall within that defined purpose, nor does it adopt the agreed upon procedure. There is nothing in the agreement to authorize a penalty to stand, but only be served in the event of future default. For these reasons alone the penalty must be altered.

8. The arbitrator agrees with this reasoning as an additional reason requiring intervention.

Booking Unfit

9. Article 32.01 of the LE West collective agreement reads[1]:

> 32.01 An Engineer being physically unfit for duty will report same to the Crew Management Centre, so that the employee may not be called. When the engineer reports for duty they will go out on their assigned run or in their turn. The employee will not be disciplined for "booking unfit".

10. Article 32.01 is clear. Employees have the right to report to the Crew Management Centre that they are unfit for duty. The purpose of this proactive reporting is so that they will not be called for work. This right to book unfit does not attract discipline.

[1] For ease of reference, the arbitrator added the final sentence to the cite for article 32.01. This reference to discipline was added by the 2012 Kaplan Award issued under the 2012 *Restoring Rail Service Act*. The parties continue to work on a consolidated collective agreement which would incorporate all the changes which have occurred over several bargaining cycles.

11. On August 4 and October 7, 2015, Mr. Desjarlais called in to book unfit (U-1; Union Brief; Tab 4 QA 27 & QA 36) in accordance with article 32.01. This was not a situation where Mr. Desjarlais waited to receive a call and then booked unfit. This latter scenario could attract discipline: CROA&DR 4524.

12. CP held an investigation on December 30, 2015. Mr. Desjarlais explained that on both occasions when he booked unfit, he was "not rested to go to work" due to taking care of his sick daughter.

13. CP imposed a 30-day deferred suspension for these two incidents, as well as for booking sick, *infra*.

14. The TCRC did not persuade the arbitrator that the delay before CP investigated these matters rendered the discipline void *ab initio*. The nature of absences like these means that an investigation may not take place after each one. It is often only a course of conduct which prompts an investigation: CROA&DR 3804.

15. CP did not satisfy its burden of proof for the two booking unfit incidents. Mr. Desjarlais explained why he felt unfit; it was due to caring for his sick daughter. He advised CP as required by article 32.01. CP produced no evidence to contest Mr. Desjarlais' facts. But that is what the burden of proof requires it to do.

16. In CROA&DR 4604 this Office examined the difference between evidence and suspicion:

> 22. CP clearly suspected Mr. Stringer's actions, perhaps because of the time of year. It further characterized as suspicious Mr. Stringer's conversation with the Trainmaster.
>
> 23. But that does not prove that Mr. Stringer was dishonest or intended to abuse his rights under the collective agreement. There is no presumption in this area. Discipline must result from the evidence, on a balance of probabilities, as opposed to speculation or suspicion. There was no evidence, as just one possible example, that Mr. Stringer did anything inconsistent with being sick when he was off.
>
> 24. The evidence demonstrates that Mr. Stringer spoke to his Trainmaster about his condition. He finished his tour of duty, but later called in sick for his next shift on December 27. Whether he booked unfit under the collective agreement or sick, there was no evidence to support CP's inference that Mr. Stringer was not being honest.

17. Conversely, again in CROA&DR 4604 but for a different incident, CP pleaded sufficient facts to meet its burden:

> 37. CP has demonstrated that there were grounds for discipline when the crew of FS22 failed to conduct the mandatory Rule 110 inspection. On a balance of probabilities, the arbitrator finds CP's evidence more credible than that of Mr. Stringer et al. There are several reasons for this credibility finding.
>
> 38. First, a crew which inspects a passing train is obliged to communicate its findings to the crew of that train. If a crew is unable to conduct the pull-by inspection, in full or in part, it does not follow that they are then relieved of communicating. One would think it would be just as crucial, if not more so, to advise the other train of the reasons why a proper inspection could not occur.
>
> 39. Second, while it is conceivable that Mr. Stringer thought Trainmaster Drouin had been talking about a different train (Train 113) (U-1; Union Submission; Tab 10; QR 12), Trainmaster Drouin's written recollection was quite detailed.
>
> 40. Third, even if one accepted Mr. Stringer's suggestion his crew did a partial inspection of Mr. McRobbie's Train 142-13 (U-1; Union Submission; Tab 10; QR 32), it seems incredible that they would not advise that train's crew of this fact and the coyote problem. Moreover, it seems again incredible that they would make no mention of the

> coyote problem when questioned virtually contemporaneously by Trainmaster Drouin.
>
> 41. On a balance of probabilities, and given the obligation to decide credibility issues within the parameters of the parties' longstanding expedited arbitration system, the arbitrator concludes that it is more probable than not that Mr. Stringer failed to do the Rule 110 inspection and later attempted to avoid taking responsibility for that failure.

18. In the instant case, CP failed to demonstrate any grounds for disciplining Mr. Desjarlais for booking unfit in accordance with the collective agreement.

Booking sick at time of call

19. On Friday, November 20, 2015, Mr. Desjarlais received a call to work and used that occasion to book off sick. On December 30, 2015, CP investigated this incident, as well as the earlier booking unfit incidents, *supra*.

20. CP persuaded the arbitrator that it had grounds to discipline Mr. Desjarlais when he booked sick, but only after receiving a call for duty.

21. This Office has consistently noted employees' obligations when they receive a call to work. Arbitrator Picher described those obligations in CROA&DR 3981:

> The discipline in the instant case was not issued by reason of the grievor's absence, nor did the Company question the legitimacy of his illness. Rather, the discipline assessed is for the fact that the grievor did, contrary to long standing policy, await the moment of an actual call to work before advising the Company that he would not attend at work because of illness. That rule, which is of long standing, is plainly intended to ensure that employees exercise a degree of vigilance and responsibility in giving their employer reasonable advance notice of their inability to attend at work by reason of illness. I am satisfied that that is not an unreasonable requirement in the railway industry which must operate on a 24 hour a day, 7 day a week basis, with many

> trains being required to operate at unscheduled and sometimes unpredictable times.

22. Arbitrator Picher found it appropriate for a first offence to reduce the penalty to a written warning:

> In the result I am satisfied that the Company did have just cause to assess discipline against the grievor, and that on a first infraction of this kind the registering of a written reprimand was appropriate. The grievance must therefore be dismissed.

23. In CROA&DR 4524, this Office similarly substituted a written warning for 15 demerit points for a situation involving an employee who received a call and then booked unfit.

24. Mr. Desjarlais's disciplinary record indicates that this is not the first time an incident of this nature has occurred (E-2; Employer Brief; Tab 3 & U-1; Union Brief; Tab 2). This fact distinguishes this case from those involving a first offence.

25. In the instant case, a written warning would not be sufficient. Progressive discipline means sanctions for repeated and similar incidents necessarily increase over time in a continuing attempt to correct behaviour: CROA&DR 3314.

26. The arbitrator accordingly substitutes a 3-day suspension for the original 30-day suspension. This suspension applies solely to Mr. Desjarlais receiving a call for work and booking off sick at that time. No discipline was warranted for the two occasions when Mr. Desjarlais booked unfit in accordance with the collective agreement.

27. The arbitrator remains seized for any questions arising from this award.

May 10, 2018

GRAHAM J. CLARKE
ARBITRATOR