CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4524

Heard in Montreal, December 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of five assessments of discipline, and subsequent discharge of Conductor D. Playfair of Kenora, Ontario.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

A. 15 Demerits

Following a formal investigation, Mr. Playfair was issued 15 demerits "For booking unfit on 5 separate occasions; July 25th, August 24th, September 14th, September 26th, and October 13th, 2014 and for booking unfit on call on September 27th (119-25 @ 14:52), a violation of the Attendance Management Circular #006/14; and as witnessed by your investigation on October 30th, 2014 in Kenora, ON."

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.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to allegations of absenteeism. Additionally, it is the Union's position that the Company has failed in providing the absences in question were not bona fide.

The Union submits that Mr. Playfair was disciplined for booking unfit, which the Company is not at liberty to assess discipline for and is contrary to the Collective Agreement.

The Union contends the discipline assessed to Mr. Playfair is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. Additionally, the Union asserts the discipline assessed violates the Collective Agreement, as well as Company Policy. Accordingly, the Union requests the discipline be removed from Mr. Playfair's employment record, and he be made whole for all associated loss. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

B. 30 Day Suspension

Following a formal investigation, Mr. Playfair was issued a 30 day suspension described as "For booking unfit on March 14th, 2015. For missing your call on 3 separate occasions; February 5th, 2015 (118-02 @ 00:24), March 22nd, 2015 (113-19 @ 01:07), March 22nd, 2015

(341-23 @ 02:48), a violation of the Attendance Management Circular #006/14; and as witnessed by your investigation on March 27th, 2015, 2014 in Kenora, ON."

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to allegations of absenteeism. Additionally, it is the Union's position that the Company has failed in providing the absences in question were not bona fide.

The Union further contends that Mr. Playfair was disciplined for booking unfit, which the Company is not at liberty to assess discipline for and is contrary to the Collective Agreement.

The Union submits the discipline assessed to Mr. Playfair is excessive, unjustified, unwarranted in all the circumstances, including significant mitigating factors evident in this matter. Additionally, the discipline assessed is contrary to the arbitral principles of progressive discipline, the Canada Labour Code, Company policy and the Collective Agreement. Accordingly, the Union requests the discipline be removed from Mr. Playfair's employment record, and he be made whole for all loss associated. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

C. 30 Day Suspension

Following an investigation, on December 7, 2015 the Company assessed Mr. Playfair a 30 day suspension described as "For intentionally delaying your train at Molson, MB due to an in-adequate Job Briefing and unneeded switching movements and duties while working as a Conductor on train 320-603 on October 26th, 2015; a violation of General Notice, General Rule A (i), (iii), (vi), (viii), & (ix), CROR 83 & 106, and Trains and Engines Safety Handbook T-0 Job Briefings."

The Union contends that the Company failed to advise Mr. Playfair in writing of the discipline assessed within the time limits allowed, contrary to Article 70.04 of the Collective Agreement.

The Union also contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. In the alternative, the Union submits that Mr. Playfair's suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is discriminatory and contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed entirely from Mr. Playfair's record, and be made whole for any losses incurred with interest (including for time held out of service). In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions.

D. Discharge - Derail

Following an investigation, on December 7, 2015 the Company dismissed Mr. Playfair which was described as "For derailing the 2 tail end cars of you movement, the DME51309 and CP607939, while shoving your train into the North Storage Track at Molson, MB without protecting the point of your movement while working as a Conductor on train 321-14 on November 15th, 2015, a violation of General Notice, General Rule A (i), (iii), (vi), (viii), & (ix), General Rule C(i), CROR 104.5, 106, 115 (a) & (b), and Trains and Engines Safety Handbook T-0 Job Briefings."

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 Mr. Playfair be made whole.

The Union submits that Mr. Playfair's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. It is also the

Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Playfair is made whole for all associated loss with interest (including for time held out of service). In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions.

E. Discharge – Bond of Trust

Following an investigation, on December 7, 2015 the Company dismissed Mr. Playfair which was described as "As you have breached the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline record and the culminating incident of your conduct unbecoming during the results of an investigative statement held with you on November 26th, 2015, as evidenced by your positive substance test on November 15th, 2015. The above referenced incident is a violation of General Notice, General Rule A (ix), General Rule G, and Alcohol & Drug Policy and Procedure (OHS 4100 and 5100)."

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 Mr. Playfair be made whole.

The Union further contends that the penalty of discharge is discriminatory, unjustified, unwarranted and excessive in all circumstances. Contrary to the reasons given in the Form 104, there is no evidence whatsoever of any violation of Rule G in the circumstances.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations breaching the bond of trust, or conduct unbecoming.

The Union requests that Mr. Playfair be reinstated without loss of seniority and benefits, and that he be made whole for all associated loss with interest (including for time held out of service). Further, the Union seeks damages, in amounts to be determined, resulting from the aforementioned violations. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) D. Fulton
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Pezzaniti	– Manager, Labour Relations, Calgary
D. E. Guerin	– Senior Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
M. Wallace	– Local Chairman, Kenora
D. Playfair	– Greivor, Kenora

AWARD OF THE ARBITRATOR

Introduction

1. The facts and issues for Mr. Playfair's 5 separate cases have already been set out above and in the parties' materials. The arbitrator will avoid repetition and instead focus on the reasons for the 5 required decisions.

A. 15 Demerits

2. In 2012, Arbitrator Kaplan introduced this clause into the parties' collective agreement:

> An employee being physically unfit for duty will report same to the crew management centre, so that the employee may not be called. **The employee will not be disciplined for "booking unfit"**. (Emphasis added)

3. The parties take different positions on the meaning of this language. CP argued that any abuse of this provision can still attract discipline and refers to previous CROA case law. The TCRC argued the Kaplan award made the right for "booking unfit" unequivocal and unfettered.

4. There is no need to resolve that interpretation dispute in this decision. Even if, solely for argument purposes, one accepted CP's position, the evidence produced did not demonstrate abuse.

5. There is a difference between suspicion and actual evidence: **CROA&DR 3618**. In this instance, Mr. Playfair booked 5 days off during an 8-month period between March 3 and October 27, 2014: 2 Fridays; 1 Saturday; 1 Sunday and 1 Monday (a Thanksgiving

holiday). CP argued this pattern showed that Mr. Playfair used the booking off clause to take off preferred rest days.

6. Notwithstanding CP's suspicions, this booking experience over an 8-month period does not demonstrate, without more, that any abuse occurred. Unlike in **CROA&DR 3879**, CP provided no evidence that Mr. Playfair was in fact fit. Moreover, medical evidence existed for 2 of the 5 days at issue. The TCRC accepted that Mr. Playfair ought to have booked off as sick for those two days, rather than as unfit.

7. The TCRC accepted that booking unfit at the time of a call, as opposed to before receipt of a call, may result in discipline: **CROA&DR 3981**. Based on all the allegations made, and the evidence presented, the arbitrator has decided to uphold this grievance, in part. The arbitrator orders CP to remove the 15 demerit points from Mr. Playfair's record. A written warning shall be substituted, but solely to address Mr. Playfair's booking unfit at the time he received a call.

B. 30 Day Suspension

8. Mr. Playfair booked unfit on Saturday, March 14, 2015. He had missed a call on Thursday, February 5, 2015 and missed two others on Sunday, March 22, 2015. Apart from the missed call on a Thursday, CP suggested the dates confirmed a weekend pattern of abuse.

9. Even if one accepted, again solely for the sake of argument, CP's position on the Kaplan booking unfit clause, the evidence did not demonstrate that any abuse occurred when Mr. Playfair booked unfit on Saturday, March 14. The arbitral case law is clear

that significant penalties follow if the evidence demonstrates that an employee has engaged in falsehood and deceit: **CROA&DR 2707**. But the parties only get to debate those legal principles if grounds for discipline exist.

10. The situation with the missed calls is different. CP has satisfied the arbitrator that Mr. Playfair failed to respond to calls to work and that such behaviour can lead to discipline: **CROA&DR 3639**. While the evidence indicated that Mr. Playfair may have been unaware of a change in Kenora procedure and might have been out of cell range at times, he nonetheless had the responsibility to be available for a call.

11. Accordingly, the arbitrator substitutes a written warning for the 30-day suspension Mr. Playfair received. The TCRC indicated that Mr. Playfair never actually served the 30-day suspension imposed for the above incidents. The arbitrator took this factor into account when deciding on the appropriateness of a written warning for the missed calls.

C. 30 Day Suspension

12. On December 7, 2015, CP imposed a 30-day suspension on Mr. Playfair, *inter alia,* for "intentionally delaying" his train. CP alleged Mr. Playfair's decisions resulted in a 5-hour delay and the need for a recrew.

13. The TCRC disputed the length of the delay and contested the discipline based both on timeliness and for a lack of just cause.

14. Article 70.04 of the collective agreement contemplates multiple statements being taken during an investigation. Discipline must be imposed "within 20 days" of the date

the investigation is completed, which is further described as being within 20 days of the taking of the last statement. The arbitrator is satisfied that CP did not violate this article, since it imposed discipline on December 7, 2015, which was within 20 days of Mr. Playfair's last statement on November 27.

15. CP did not satisfy the arbitrator that Mr. Playfair "intentionally" delayed his train when carrying out various duties. The facts in this case differ significantly from the types of situations where allegations are made that an employee intentionally sought to delay a train: **CROA&DR 3952**.

16. While a debate may exist whether Mr. Playfair could have followed another method which would have avoided delay, that is a considerably different allegation from one alleging a specific intent to delay a train. The evidence shows that Mr. Playfair adhered to various requirements when carrying out his multiple duties. CP did not demonstrate that Mr. Playfair was simply doing unproductive work when performing these duties.

17. Accordingly, the arbitrator accepts the TCRC's grievance and orders that the 30-day suspension be removed from Mr. Playfair's discipline record.

D. Discharge – Derail

18. On November 15, 2015, Mr. Playfair failed to protect the point during the setoff of 56 cars. This failure resulted in two cars derailing, since they could not all fit on the track. CP terminated Mr. Playfair on December 7, 2015 for this and other matters.

19. The TCRC did not dispute the facts, but contested the severity of the penalty imposed.

20. CP has satisfied the arbitrator that it had grounds to discipline Mr. Playfair for this rule violation which resulted in two cars derailing. CP has advised it does not wish to follow the Brown system any longer. Previous cases have suggested the appropriate types of penalties for this type of scenario. The parties in future cases will have to debate in detail appropriate penalties if the Brown system will not be followed so that consistent standards can be developed over time.

21. In the current circumstances, considering Mr. Playfair's remorse and admission, the arbitrator substitutes a 2-week suspension for the termination originally imposed. CP will reinstate Mr. Playfair, without loss of seniority or benefits, and compensate him for the period other than during the substituted suspension.

E. Discharge – Bond of Trust

22. The November 15, 2015 failure to protect the point also led CP to conduct a drug and alcohol test on Mr. Playfair.

23. The arbitrator upholds the TCRC's grievance for the following reasons.

24. CP had the burden of proof to demonstrate that Mr. Playfair was impaired at the time of the November 15, 2015 incident. As numerous CROA decisions have already noted, it is not enough to show that a urine test indicates an employee may have traces of marijuana in his/her system. Those results do not demonstrate impairment at the

material times. In Mr. Playfair's situation, he tested negative for the more specific oral fluid drug test.

25. CP's position, as set out in its policy and as argued, posits that employees should never take illegal drugs. But the case law has not upheld a policy that extends that broadly.

26. From a basic evidentiary perspective, CP did not demonstrate that Mr. Playfair was impaired at the time of the derailment. This same conclusion has been reached numerous times before: **CROA&DR 3668** and **CROA&DR 4296**. Since CP did not meet its evidentiary burden, the arbitrator upholds the TCRC's grievance and orders that this discipline be struck from Mr. Playfair's discipline record.

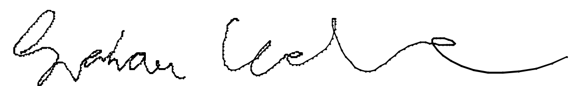
Summary

27. For ease of reference, the 5 grievances have been resolved as follows:

> **October 31, 2014** 15 demerits – Written warning substituted for booking unfit at time call received
>
> **April 16, 2015** 30-day suspension – Written warning substituted for missing calls
>
> **December 7, 2015** 30-day suspension intentional delay - Overturned
>
> **December 7, 2015** Discharge Derail – 2-week suspension substituted
>
> **December 7, 2015** Discharge marijuana urine test – Overturned

28. The arbitrator remains seized for any questions arising from this award and the remedies granted.

January 26, 2017



GRAHAM J. CLARKE
ARBITRATOR