CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4598

Heard in Calgary, November 16, 2017

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer Cameron Murtagh of Revelstoke, BC.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Engineer Murtagh was issued a letter from the Company informing him that he was dismissed from Company service for the following reasons; Please be advised that you have been DISMISSED from Company service for the following reason(s): *For failing to immediately report an injury you sustained at work on Oct 5, 2016. A violation of GOI Sec 11, Item 6.0, Rule Book for Train & Engine Employees Sec 2, 2.2(a) and T&E Safety Rule Book CORE Safety Rules, Item 1, Rights and Responsibilities.*

Engineer Murtagh sustained an injury on October 5, 2016 which he reported once he realized the seriousness of the injury. The Union contends the incident as stated is not worthy of the ultimate penalty of dismissal.

The Union contends that even if Engineer Murtagh did not immediately report his injury the Company has not produced any evidence that would justify the ultimate penalty of dismissal.

The Union has conducted a search of CROA awards and found numerous cases similar in nature. CROA Awards 3308, 3374, 3980 and 4401 are just a few where the Arbitrator has over turned discipline for not immediately reporting an injury. In the very latest CROA Award 4522, the Arbitrator again supported the decision of Arbitrator Piche in CROA Award 3308.

It is the Union's contention the dismissal of Engineer Murtagh is unjustified, unwarranted and excessive in all of the circumstances. It is further our contentions this wrongful dismissal constitutes a violation of the Canada Labour Code and that the actions of the Company in this case may be a violation of the Workers Compensation Act of B.C. and the Workers Compensation Regulations.

The Union further contends the discipline imposed is unwarranted, unjustified and excessive in the circumstances. Based on the evidence presented, the Union contends the record in this case does not support the issuance of the ultimate penalty of dismissal.

The Union requests that Engineer Murtagh's dismissal be removed from his record and that he be reinstated to his former position without loss of seniority or benefits, and made whole

for all wages lost, with interest, in relation to the time withheld from Company service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's requests.

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

There appeared on behalf of the Company:

S. Oliver	– Labour Relations Officer, Calgary
L. McGinley	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
L. Daley	– Vice General Chairman, Revelstoke
C. Murtagh	– Grievor, Revelstoke

AWARD OF THE ARBITRATOR

Locomotive Engineer Cameron Murtagh (the "Grievor"), joined the Company on June 2, 1997. Although less than stellar, his work record shows no discipline since 2009.

On October 31, 2016, his employment was terminated for: "*Failing to immediately report an injury you sustained at work on October 5, 2016*."

The Company unilaterally reinstated the Grievor on March 13, 2017, "*subject to a time served suspension*" (approximately 4.5 months).

On October 10, 2016, Superintendent Ken Haddad received a call from the Grievor informing him that he (the Grievor) would be booking off unfit as he had sustained a back injury during his tour of duty five days earlier. The Grievor claimed that on his tour of duty from October 5 to October 6, 2016, he aggravated a previously sustained back injury. However, he did not report the injury at that time. Rather, he reported for another tour of

duty from October 8 to October 9, 2016 and, although he was feeling discomfort at the time, again did not report anything until after he returned from the trip and made the call to Superintendent Haddad the following morning.

During an investigation, he acknowledged that he was aware of the General Operating Instructions (GOI), section 11 - 6.0 which required him to immediately report an accident/incident or injury. When asked why he failed to report the injury as required by the GOI, he allowed that:

> "There was no single incident that caused this injury, the discomfort built up over normal operation of the locomotive over the course of the day. The locomotive had a low to the ground un-adjustable seat which seemed to put stress on my lower back. I didn't report it immediately because I thought I could resolve the issues with my back by moving around and stretching."

Although he concedes that the discomfort and injury persisted, he took another tour of duty on October 8, returning to Revelstoke on October 9. He admits that he was in pain during this trip but did not report it at the conclusion of the tour. He confirmed, in his formal statement, that the pain did not subside from the initial date of injury on October 5 to his eventual report on October 10, 2016.

Following the investigation, the Grievor was dismissed by way of Form 104 for failing to:

> "Immediately report an injury you sustained at work on October 5, 2016. A violation of GOI sec 11, Item 6.0"

The Union grieved the dismissal on the basis that it was unjustified, unwarranted and excessive in all of the circumstances. It argued that there is no cogent evidence of any dishonest conduct or deceit on the Grievor's behalf.

The Company argues that the discipline was warranted in that the late reporting of any injury in the railway industry is well known to be a cause of upmost concern and the failure to do so risks further aggravation of the injury; puts other employees at risk of sustaining the same or similar injury; causes safety concerns in that the Grievor is unable to perform the job fully; and, creates circumstance where the Company is unable to verify the injury.

It is apparent, that while the Company had in mind the concerns expressed above, it was also skeptical of the circumstances surrounding the injury as the Grievor reported. Given the inconsistencies in the Grievor's original statement, and his answers with respect to the nature of his injury and its severity prior to the second trip, I understand the Company's skepticism. As indicated in **CROA 4484**:

> "The Grievor's decision not to report the incident once he realized it was causing or aggravating his pain denied the Employer a timely opportunity to investigate the incident for preventative purposes and to move immediately to assess the bona fides of the Grievor's claim"

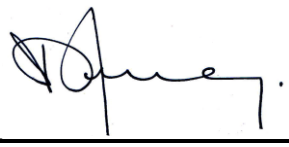
Nevertheless, as pointed out by the Union, there is no cogent evidence to support the inference that the Grievor's conduct was dishonest or deceitful.

Given the same, and the uncontradicted explanations provided by the Grievor, I am of the view that the penalty of dismissal originally imposed in the circumstances here was excessive.

The penalty imposed must be proportional to the transgression alleged. In my view, a discipline of dismissal is disproportionate in the circumstances and should be replaced with a suspension of one month.

The grievance is allowed in part. The dismissal will be set aside and replaced with a one month suspension. The Grievor, having already been reinstated, shall be otherwise made whole

January 5, 2018



RICHARD I. HORNUNG
ARBITRATOR