

IN THE MATTER OF AN AD HOC ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)
And
CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

AH 776

DISPUTE:

Appeal of the dismissal of Conductor Tyler Beitz of Winnipeg, MB.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Beitz was dismissed which was described as:

“A formal investigation was conducted on June 19, 2020 to develop all the facts and circumstance in connection with your "allegedly submitting wage claims for days worked between October 28, 2019 and February 12, 2020 that you were not entitled to". At the conclusion of that investigation, it was determined that the investigation record as a whole contained substantial evidence proving that you submitted wage claims for which you were not entitled on numerous occasions from the period of December 3, 2019 to February 12, 2020.

Please be advised that you are hereby **DISMISSED** from Company Service for the following reason(s):

For Conduct Unbecoming of an Employee, as evidence by the wage claims you submitted for wages which you were not entitled to, between the dates of December 3, 2019 to February 12, 2020, inclusive.”

UNION POSITION

The Union contends the Company has failed to meet the burden of proof required to sustain the allegation of theft, or any related contention implied through Conduct Unbecoming. In the alternative, the Union contends that Mr. Beitz’s dismissal is unjustified, unwarranted,

discriminatory, and excessive in all of the circumstances, including mitigating factors in this matter.

The Union submits the Company has failed to recognize Mr. Beitz's condition as requiring further accommodation, and has knowingly and discriminately dismissed him from Company service considering all rights afforded through the Workplace Accommodation Policy, Discrimination & Harassment Policy, Fitness to Work Policy, Medical Procedures Policy and Return to Work Policy. Additionally, it is the Union's position the actions of the Company in this case are in violation of the *Canadian Human Rights Act*, *Canada Labour Code*, the legal obligation to accommodate an employee and Article 36 of the Collective Agreement.

As outlined in its grievance, the Union reserves the right to rely on any and all information contained within Mr. Beitz's WCB claim (#18014877), and the complaint filed as a result of the Company's actions.

The Union requests that Mr. Beitz be reinstated without loss of seniority and benefits, that the discipline be removed in its entirety, and that Mr. Beitz be made whole for all lost earnings with interest (including, but not limited to the assertion of wage overpayment). In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

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

The Company maintains the Grievor's attempted justification of his actions were insufficient and unacceptable. Moreover, the Company maintains the severity of the Grievor's actions cannot be minimized by a re-payment plan with the Grievor or by WCB.

Following a fair and impartial investigation, the Grievor's culpability was established for the improper submission of wages. Discipline was determined following a review of all pertinent factors. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. The Company cannot agree this determination nor assessment of discipline was in any way discriminatory. This allegation, along with all alleged violation of Company policy, the Canadian Human Rights Act, Canada Labour Code and Article 36 of the Consolidated Collective Agreement, is without merit and not supported by fact.


Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole."

The Union has further stated a desire to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the collective agreement and/or any applicable statutes, legislation, acts or policies. In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.

FOR THE UNION:

FOR THE COMPANY:



_____ for

Dave Fulton
General Chairman
TCRC CTY West

_____ for
Lauren McGinley
Assistant Director, Labour Relations
Canadian Pacific Railway

March 3, 2022

Hearing March 30, 2022 – By Videoconference

Appearing for the Union:

Ken Stuebing – Counsel, CaleyWray
Dave Fulton – General Chairman CTY West
Ryan Finson – Vice General Chairman CTY West
Doug Edward – Sr. Vice General Chairman CTY West
Jason Hnatiuk – Vice General Chairman CTY West
Virgil Sedler - Local Chairman CTY, Winnipeg
Tyler Beitz – Grievor, Winnipeg

Appearing for the Company:

Lauren McGinley, Assistant Director Labour Relations
John Bairaktaris, Director Labour Relations
Melanie Brace, WCB Specialist

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] The initial facts of this matter are largely not in dispute although the parties disagree on the relevance of the early facts relating to the Grievor's involvement in a train and vehicle collision.

[3] On June 12, 2018, the Grievor Mr. Beitz, was operating as the Conductor on a CP freight train that struck a vehicle straddling the tracks at an intersection. The train did not come to a full stop immediately and Conductor Beitz was tasked with returning to the scene on foot where he found the critically injured driver. He remained with the man while he died waiting for Paramedics arrived approximately one hour later.

[4] Between June 12, 2018 and August 23, 2019, after a period of being deemed totally unfit for all work, the Grievor was deemed FIT for non-safety sensitive modified/alternate duties with restrictions. This Health Services determination continued to apply based on successive Function Abilities Forms (FAFs) until February 6, 2020.

[5] On June 17, 2020, the Grievor was issued a Notice of Investigation for a statement to be held on June 19, 2020 in connection with:

Allegedly submitting pay claims for days worked between October 28, 2019 and February 12, 2020 that you were not entitled to.

[6] Following an investigation, the Grievor was dismissed from Company Service on July 17, 2020 for submitting wage claims for which he was not entitled from the period of December 3, 2019 to February 12, 2020.

ANALYSIS AND DECISION

[7] The Union submits that the accident of June 12, 2018 was horrific and caused severe psychological damage to Conductor Beitz in the form of depression and post-traumatic stress disorder (PTSD). The Union argues that the Company does not dispute this although it has refused to accept it as a mitigating factor in the present matter.

[8] The Company maintains that the Union's portrayal of this as a complex case fraught with mitigating circumstances is misplaced. It maintains this case is very simple at its core, one of an employee entering time and collecting wages for time not worked.

[9] The Company submits that the proper process was followed. Modified work was found in the Winnipeg Network Service Center and discussed with the Grievor and WCB representative, Dorri Ruffeski, over the phone on October 1, 2019. The Grievor verbally accepted the Company's

offer of modified work and was sent a copy of the Return to Work Plan that had been discussed on the call. This work accommodation began on October 7, 2019.

[10] CP says that in response to concerns raised by the Grievor's Union Representative, Wes Geiler, on October 31, 2019, a return to work meeting was subsequently held with all the parties to discuss the Grievor's restrictions and a revised Return to Work Plan. It says Company records reflect that the Grievor stopped attending his modified duties as of December 19, 2019. However, it was not until February 6, 2020, that the Company actually received an updated FAF indicating the Grievor was "totally unfit for any work" as of that date.

[11] The Company submits that on February 14, 2020, this updated status was submitted to the Company's Employee Services to enter into SAP for tracking purposes. As the Grievor had submitted claims for full day's payment for February 7 and 10-12, 2020, Employee Services naturally questioned whether the time entries were incorrect or if the employee's updated status had the wrong effective date. This prompted a review of the Grievor's time entries revealing what appeared to be 51 improper time claim entries from November 15, 2019 through to March 5, 2020,

[12] At the request of the Grievor, his Union Representative Wes Geiler, and Superintendent Nicholas Pattyn with WCB Specialist Melanie Brace and Disability Management Specialist Jennifer Lehfellner the claims were discussed. CP says that during this call, the Grievor and his Union Representative claimed the payments were a misunderstanding.

[13] On June 17, 2020, a notice of investigation was issued. The Company maintains the investigation established that the Grievor had submitted improper claims for over 10 full or part days of pay. In addition, he had claimed pay for 8 weeks when he was absent. The Grievor was therefore dismissed on July 17, 2020.

[14] The Union submits that the Company did not offer any psychological support to the Grievor following the incident. While an accident debrief was performed for approximately three hours with the crew, the Union argues that it was to determine logistics of what occurred and to assess liability. It says that no mental health services were provided. Conductor Beitz felt he was encouraged to get over it and get back to work. He returned to work after three days off. The Union argues that the return to work, not surprisingly, was unsuccessful. Conductor Beitz was subsequently absent on Worker's Compensation Benefits as of March 26, 2019. He sought psychological counselling and began a course of prescribed sleeping aides and antidepressants.

[15] On August 23, 2019, CP Health Services notified Mr. Beitz's managers of a gradual return to work plan which commenced with half-days. The Union argues that Conductor Beitz was engaged by the Company, to the exclusion of the Union in an initial return-to-work agreement dated October 1, 2019. The agreement was not signed. It says the contents were discussed by way of phone call between Conductor Beitz and Melanie Brace, Company WCB Specialist. The two discussed the work he would be performing, where he would be located, and his schedule. By way of follow up email, on the subject of compensation, Ms. Brace stated only it was important that he enter his time using the code LD.

[16] The Union submits that on October 1, 2019, Conductor Beitz was advised by WCB that if his earnings were less than what he earned prior to his workplace injury, he would be entitled to a partial wage loss. There was no mention as to how he would claim all earnings in order to be fully compensated. The Union argues that contrary to the medical advice for his return to work, Conductor Beitz was accommodated into an office position working full time (not graduated

hours) at the Winnipeg Network Service Centre commencing October 7, 2019. His hours were not graduated on his return to work October 7, 2019.

[17] The Union submits that Conductor Beitz’s return to work agreement was revisited on November 4, 2019. This time Ms. Brace spoke with Conductor Beitz but also included Mr. Wes Geiler, (Chairperson, Provincial Legislative Board of Manitoba)(“Mr. Geiler”), and Ms. Dorri Ruffeski (WCB representative). The written return-to-work agreement was not signed, dated or reviewed with Conductor Beitz or Mr. Geiler. It says that no conditions on Conductor Beitz being paid all or any earnings were discussed or agreed upon during the meeting. The Company concerning the claims that had been submitted to date raised no issue. Conductor Beitz was entirely transparent about when he worked and submitted his claims to the Company as instructed.

[18] The Company relies on the following authorities in support of the dismissal: William Scott & Co. v. C.F.A.W. Local P-162 (1976), [1977] 1 C.L.R.B.R. 1 (B.C. L.R.B.); Steel Equipment Co. Ltd. (1964) 14 L.A.C. 356; Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586 (ON LRB); Canadian Railway Office of Arbitrations Cases 461,478, 899, 1835, 2669, 1474, 4445, 4735, Ad Hoc 730, SHP 311. The Union relies on Stewart v. Elk Valley Coal Corp., 2017 SCC 30 (CanLII), [2017] 1 S.C.R. 591; Canadian Railway Office of Arbitration Cases 3614, 3409, 3434, 3481, 2854, 4213.

[19] The parties provided extensive written submissions in this Ad Hoc and expedited arbitration process. Extensive authorities were also reviewed with final argument. The process flows from an agreement to clear up a backlog of grievances. I have carefully reviewed the submissions and authorities. I will only refer to those necessary for reaching this decision.

[20] The Company submits that the Union’s argument of a complex case fraught with mitigating circumstances is unfounded. It says this case is very simple at its core and is that of an employee entering time and collecting wages for time not worked. It says the burden of proof rests with the Union to demonstrate, on the balance of probabilities, that the Grievor had a disability and that there is a connexion or link between the disability and the violation that incurred the discipline assessed. It relies on CROA 4527.

[21] The Union acknowledges it’s onus to establish a prima facie case of discrimination before the Company is required to respond to an allegation of discriminatory conduct. It relies on Stewart v. Elk Valley Coal Corp., 2017 SCC 30 (CanLII), [2017] 1 S.C.R. 591. It says that test requires it to establish:

1. That they have a characteristic that is protected from discrimination under the Code [or Act, as the case may be];
2. That they have experienced an adverse impact; and
3. That the protected characteristic was a factor in the adverse impact.

[22] In this case, the Union submits that it has met all three heads of the Elk Valley test. The Union has clearly established Conductor Beitz suffers from a disability – PTSD, depression - which is a characteristic protected from discrimination under the Act.

[23] I find the Grievor was involved in a car – train collision fatality. He was under medication and being treated for symptoms, which required an accommodation. Having carefully considered the evidence, I have no hesitation in concluding that there is a clear nexus between his condition and his actions.

[24] Absent his clearly establish involvement in the fatality and his resulting condition, I may have found termination appropriate given the repeated absences for which claims were made. However, the mitigating factors are also significant.

[25] The Grievor had only two years of prior service under the Honour System of pay and there is no evidence of any improper submissions in that period. The Grievor was absent for weeks not just days. There is no evidence that any employee could be in such a situation and not have it brought to their attention or questioned. The Company argues that the Grievor's false claims were submitted from October 2019 to February 12, 2020. The Union says it was excluded from the initial accommodation process of October 1, 2019.

[26] His return to work agreement was revised on November 4, 2019 and the Union was involved. However, there is no indication that any issues regarding his attendance was raised.

[27] There is no reason to suggest that his actions were deliberate. The realities of his condition and his new situation were clearly raised during the investigation. The Union relies on Arbitrator Picher's comments in his decision in CROA Case No. 3614:

Upon a review of the material filed the Arbitrator has some difficulty with some aspects of the Company's case. In discharging the Grievor the employer concluded that he knowingly and deliberately engaged in making fraudulent wage claims. The proof of that allegation rests upon the employer, on the balance of probabilities. To the extent that that the allegation is serious the standard of proof must be commensurate. Should the evidence disclose no more than an error of judgement or a misinterpretation of the provisions of the collective agreement by the employee, the burden of proof of establishing fraud would not be discharged.

[28] I cannot find that the Grievor is without fault. The Grievor says he thought his compensation from CP Rail was being reimbursed by WCB. Clearly, he thought about his method of being compensated. He was on a return to work agreement. He thought to contact his Union when his return to work agreement was revisited. It clearly stated he would only be compensated for hours worked. His medical condition was not constant as he clearly demonstrated. His absences increase from leaving early to being absent for entire weeks without seeking advice or approval. It was at a time when he was seeking medical advice.

[29] The Union relies on CROA Case No. 3409. Arbitrator Picher stated:

On what basis can it be said that what the grievor did was an act of fraud? Fraud is a serious allegation, which, like theft, must be established by the party bearing the burden of proof, on the basis of clear and cogent evidence. Whatever the suspicions or view of the Company, the evidence before the Arbitrator does not disclose the actions of a person who sought to manipulate or deceive the Company to obtain payment which he knew he was not entitled to receive.

[30] In reviewing the full record before me from the June 12, 2018 collision to the assessment of discipline, it is very clear that the Grievor's explanation for his pay claims was based on a misguided understanding of who and how his wages were being paid. I received no medical expert testimony regarding his state of mind and beliefs regarding his compensation. As a result, it is necessary for me to determine how much weight to assign to the various reports and documents relate to all of the other evidence before me. I find the Grievor engaged largely in uncharacteristic

misconduct based on misguided disregard for seeking clarity about a payment process. He had clearly considered the process in reaching his opinion that it was topped up by WCB. While his actions warranted significant discipline, there are also mitigating factors against termination which must be considered.

[31] The Company relies on Railway Arbitration Case Ad Hoc 700 in which the Arbitrator addressed the need for considering if reinstatement into a safety critical position stating:

Regrettably, I conclude that the Grievor's misconduct cannot be reconciled with his continued employment with the Company.

[32] In this case, I find there was no concern for false claims or inability to trust the Grievor during his employment prior to the June 12, 2018 collision. There is no dispute regarding the impact on the Grievor. He did not attempt to hide his absences and no concerns were raised by the Company. Unlike the Grievor in Ad Hoc 700, I can find no reason to believe he cannot return to that trusted status.

[33] In view of all of the forgoing, the Grievor will be reinstated without compensation or loss of seniority.

[34] I remain seized should there be any dispute with respect to any aspect of the interpretation, enforcement or implementation of this award.

Dated this 6th, day of June, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges", is enclosed in a thin black rectangular border.

Tom Hodges

Arbitrator