CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4687

Heard in Calgary, May 16, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 60-day suspension to Locomotive Engineer D. Breidfjord of Medicine Hat, AB, dated January 17, 2017.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Engineer Breidfjord was issued a 60 day suspension described as; "Please be advised that you have been assessed a sixty (60) day deferred suspension for having booked unfit on December 25th, 2016 through to December 26th, 2016 in order to obtain extra time off during the holiday season, while employed as a Locomotive Engineer in Medicine Hat, AB, a violation of the Canadian Pacific Attendance Management Policy. This suspension will be recorded into your work record subject to the following conditions and will not be served at this time.

In the event you are issued any discipline 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."

Union's Position:

The Union contends that the discipline and subsequent suspension assessed to Locomotive Engineer Breidfjord as a result of this 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 Breidfjord most certainly can be considered discriminatory when compared to the level of the alleged infraction.

The Union contends that the Company failed to achieve the burden of proof required to impose discipline, particularly such heavy handed discipline and ignored mitigating factors established in the investigation. The Union also contends that the Company violated Article 23.09 when deferring discipline as there are no provisions for deferring a suspension in any instance. The Union further contends that the Company is additionally in violation of Section 3 of the Kaplan Award and Section 239(1) of the Canada Labour Code. For these reasons, the Union contends that the discipline is null and void and ought to be removed in its entirety.

For any and all of the above reasons the Union requests that the discipline of a 60-day suspension be expunged from Engineer Breidfjord's 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 has denied the Union's request.

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Company Position:

The Company maintains that the quantum of discipline assessed to the grievor was appropriate and warranted in the given case. Mr. Breidfjord booked himself unfit for his shift on December 25th at the Medicine Hat Terminal in conjunction with roughly 35 other employee's. It is the position of the Company that Mr. Breidfjord willingly participated in an illegal strike/work stoppage. The quantum of discipline assessed the grievor for his participation in the strike for obtaining unapproved time off during the holiday season was appropriate and warranted in all the circumstances. Moreover, the Canada Industrial Relations Board also had to intervene following said work stoppage.

The Booking Unfit provisions of the Collective Agreement (Section 3 Kaplan award on Fatigue Management) referred to by the Union were the subject of a policy grievance that was unconditionally withdrawn by the Union in 2018. In any event, the Booking Unfit provisions are not to be abused which occurred in the case at hand as part of a concerted work stoppage.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Edwards	**(SGD.) W. McMillan**
General Chairperson	Labour Relations Officer

There appeared on behalf of the Company:

W. McMillan	– Manager Labour Relations, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary
D. E. Guerin	– Senior Director Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Calgary
D. Fulton	– General Chairperson, Calgary
D. Edward	– Senior Vice General Chairperson, Calgary
W. Apsey	– General Chairperson, Smiths Falls

AWARD OF THE ARBITRATOR

The grievor, a Locomotive Engineer with over years thirty of service, booked off as unfit for duty at 19:11 hrs on December 25, 2016, ten minutes before his rest period was set to expire at 19:21 hrs. He booked back on duty at 10:02 on December 26, 2016. The Company alleges that the grievor did so in conjunction with some thirty-four other employees during the same period from the Medicine Hat terminal.

The grievor indicated at his investigation that he was not aware of other employee's booking unfit on December 24, 25 and 26, 2016. He said there were no discussions with any other employees booking off sick or unfit for duty in the Medicine Hat terminal at the time. The grievor was also asked at his investigation if he understood that a large number of employees booking off sick or unfit for duty at around the same time would constitute an illegal work stoppage to which the grievor replied "No".

The Union submits that the Company has not provided any cogent evidence that the grievor ought to receive any discipline. The only evidence available is the grievor's answers at his investigation, which were never challenged, that he had no knowledge of an orchestrated effort by employees in the Medicine Hat terminal to book off sick or unfit for duty.

The Union further notes that employees like the grievor are entitled to book off work as unfit when they suspect that they are not in a proper condition to complete a full assignment of their safety sensitive duties. The grievor, in that regard, stated at his investigation "*I was not rested*" when asked about the circumstances behind his booking unfit on December 25, 2016. That response was not challenged by the Company. Nor did the Company ever put to the grievor that he booked off as unfit for duty on December 25 "*in order to obtain extra time off during the holiday season*".

It would take compelling evidence in the Union's view to conclude that the grievor participated in a concerted work stoppage. There is no such evidence in this case. As

noted recently by Arbitrator Clarke, the only proper conclusion to draw in the face of such undisputed evidence is that the grievor was not fit for duty on the date in question. See: CROA 4630. The facts are clear that even if the grievor is deserving of some discipline, which the Union forcefully argues he is not, the 60-day suspension is excessive. This case involves a single incident of booking unfit for duty for less than 15 hours. The Union further submits that the use by the Company of a deferred suspension as a form of discipline is improper, as noted in three recent decisions of this Office. See: **CROA 4620**, **4630** and **4638**.

The Company notes that some thirty-five employees booked unfit or off sick at the height of the Christmas season between December 24, 2016 and December 26, 2016. According to the Company's statistical evidence, thirty-one employees booked as unfit for work out of the Medicine Hat terminal within a 24-hour period between December 24, 2016 into December 25, 2016. The average period booked off for these employees was twenty-seven hours. Forty-six per cent of the entire workforce at the Medicine Hat terminal were booked off at the same time on Christmas Day. According to further statistics provided by the Company, the typical number of employees who book off sick or unfit for duty is two per day. The Company claims that this was a clear case of organized culpable absenteeism which ultimately led to a work stoppage.

I note the comments of Arbitrator Picher in **CROA 1911** involving a number of locomotive engineers who had booked off sick in North Bay:

> The issue is whether the evidence and material before the Arbitrator support the Company's conclusion. Work stoppages engaged in concert by employees are, like unfair labour practices pursued contrary

> to the law by unscrupulous employers, rarely admitted. Labour boards and boards of arbitration faced with such situations are frequently compelled to assess circumstantial evidence to draw the most probable inferences suggested by the facts as they appear on the whole, absent any credible explanation to the contrary.

The arbitrator is left in a similar position here of having to draw inferences from the facts. The grievor was one of almost half of the Medicine Hat terminal employees who either booked off sick or called in as unfit for duty on Christmas Day. The grievor did not provide any reason for his absence on Christmas Day at his investigation other than that "he was not rested". Although the Company did not follow up with any further questions about his condition, it did go on to ask him several questions about other employees similarly booking off sick or unfit. The grievor claimed to have no knowledge of any such discussions.

With respect, I simply can't accept the grievor's response as truthful. With so many other employees booking off sick or unfit, it is inconceivable to me that the grievor did not have any knowledge of the other employee absences, all targeted for Christmas Day. Further, this was Christmas Day, arguably the most important statutory holiday of the calendar year, which one can reasonably infer would be an opportunity for anyone to enjoy some personal time off. Finally, it is notable that the grievor waited until 17:11 hrs on Christmas Day, just ten minutes before his rest expired, before calling in unfit.

All these facts combined leads to the conclusion, on balance, that the grievor willingly participated in an orchestrated work stoppage and is deserving of discipline. As further noted in **CROA 1911**, job action of this kind "…*strikes at the heart of the grievance*

and arbitration system that is an intrinsic part of the scheme of stable and orderly collective bargaining established under the Canada Labour Code".

The last issue concerns the matter of the quantum of penalty. I join with the most recent decisions of this office in **CROA 4620**, **4630** and **4638** with respect to the analysis of deferred suspensions, as set out in the Consolidated Collective Agreement (April 2019) between these parties at 39.13 (formerly article 23.09). In the most recent of those three awards, Arbitrator Hornung finds at p. 11:

> Finally, the Union argues that the imposition of deferred disciplines, in the 14 and 30 day suspensions, do not comply with the requirements of Article 72.09 of the Collective Agreement. I agree. As already pointed out by Arbitrator Sims in CROA 4620 and Arbitrator Clarke in CROA 4630, the use of deferred discipline must fall within the parameters of Article 70.09. In both the 14 and 30 day suspensions, they do not. However, while the deferred disciplines imposed did not comply with the provisions of Article 70.09, the breach of the same (as reflected by both decisions above) calls for an intervention and alteration of the penalty rather than voiding the discipline in its entirety.

As Arbitrator Sims pointed out in **CROA 4629**, it has been left to the parties under the collective agreement "when and how deferred discipline may be used". One of those requirements, as pointed out by the Union, is that the employee must agree to receive the deferred suspension. Similar to the facts in **CROA 4630**, the grievor did not agree to a deferred suspension in this case.

I agree with Arbitrator Hornung, following the two earlier decisions of Arbitrator Sims in **CROA 4620** and Clarke in **CROA 4630**, that a breach of the deferred suspension provision calls for an alteration of the penalty rather than the outright voiding of the discipline, as the Union requests.

This is not a case where the Company determined that the grievor should incur an immediate financial penalty for his behaviour. Although the case law is clear, as noted by Arbitrator Clarke in **CROA 4524**, "…that significant penalties follow if the evidence demonstrates that an employee has engaged in falsehood and deceit", I do not believe, given all the circumstances, that a financial penalty in the form of a suspension should be imposed on the grievor at this time. Apart from the fact that the incident occurred some two and a half (2 $^{1/2}$) years ago, the grievor has no active demerits on his record at the time of the incident. The grievor is also an experienced and long-term employee with in excess of 30 years of service.

I find that the appropriate response would be to substitute the 60 day deferred suspension with a written warning to the grievor that his absence from work on beginning Christmas Day December 25, 2016 was an unacceptable and improper use of the unfit for duty provision of the collective agreement.

May 30, 2019

JOHN M. MOREAU, Q.C.

ARBITRATOR