CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5227

Heard in Montreal. November 13, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company discharged Mr. Desrocher as an "administrative termination" on November 6, 2024.

JOINT STATEMENT OF ISSUE:

On November 6, 2024, the Company discharged Mr. Desrocher when it issued him an administrative termination letter stating, *"*I am writing to inform you of the Company's decision to terminate your employment effective today, November 6, 2024.*"* Due to non-culpable absenteeism.

Union's Position:

It is the Union's position, however not limited hereto, that the Company's actions are contrary to Articles 82, 85, 85.5, Addendum 123 and 124 of Collective Agreement 4.16, Arbitral Jurisprudence, when Conductor Desrochers was assessed an outright discharge as a result of the Company's closure of his file without a single investigation.

The Union argues that the discipline imposed was excessive, unwarranted, unjustified, and applied in bad faith.

The Union contends that the Company failed to comply with Article 82 of 4.16 by not conducting an investigation; in simple terms, the Grievor was dismissed without the due process guaranteed by the 4.16 Collective Agreement.

The Union further contends that this violated the substantive rights of Conductor Desrochers under the Collective Agreement by not conducting a fair and impartial investigation. Therefore, it should declare the discharge null and void from the outset.

The Union further argues that the Company violated the Canada Labour Code and the Canadian Human Rights Act when it summarily dismissed Conductor Desrochers for booking sick leave, being unfit, and taking authorized leave.

Due to the violations, the Union requests that Conductor Desrochers be compensated for all his lost wages, benefits, and pensionable service during the period he was out of service.

The Union further requests an order requiring the Company to cease and desist from these actions in the future, as the Company has made this a new practice despite violating the 4.16 Collective Agreement and the Canada Labour Code.

Company's Position:

The Company respectfully disagrees with the Union's position in this matter. The termination of the Grievor was the result of an administrative process initiated due to excessive

absenteeism. The Grievor was counseled on multiple occasions and was afforded several opportunities to improve his attendance. Despite these efforts, the attendance issues persisted and the Grievor failed to maintain an acceptable attendance record.

The Company maintains that it has acted in accordance with the terms of the Collective Agreement, the Canada Labour Code, and the Canadian Human Rights Act. No violations of these frameworks have occurred.

Accordingly, the Company respectfully requests that the grievance be dismissed in its entirety.

For the Union:
(SGD.) J. Lennie
General Chairperson

For the Company:
(SGD.) J-F. Migneault
Manager Labour Relations

There appeared on behalf of the Company:

C. Jodoin	– Counsel, Norton Rose Fulbright, Montreal
F. Daignault	– Director, Labour Relations. Montreal
A-H. Chouman	– Junior Associate, Labour Relations, Montreal
J. St-James	– Supervisor, Support Center, Montreal
M-F. Daigneault	– Senior Manager, Operation Excellence HR, Montreal
T. Sadhoo	– Senior Expert, Labour Relations, Calgary (zoom)

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Brockville
E. Page	– Vice General Chairperson, CTY-C, Hamilton
N. Beveridge	– Local Chairperson, Montreal
M. Kernaghan	– General Chairperson, LE-E, Trenton
S. Madey	– Vice General Chairperson, Sudbury
S. Desrochers	– grievor, Montreal (zoom)

AWARD OF THE ARBITRATOR

Overview

[1] The Grievor, a Conductor with approximately 4 years of employment, was dismissed on November 6, 2024, for non-culpable absenteeism. He was reinstated in 2025 by the Employer.

[2] The Office must first decide if the dismissal and the procedure that preceded it were administrative or disciplinary in nature, and if the Employer has met the two-part test to justify the dismissal of the Grievor.

[3] The Office finds that the procedure and the dismissal were administrative in nature. It also finds that the Employer has shown that the Grievor had an absenteeism rate much higher than his peers and that no improvement could reasonably be expected in the future. The Union has not shown that the Employer's conduct violates the Grievor's rights under the *Canadian Human Rights Act* or the Canada Labour Code. Therefore, the grievance is dismissed.

Analysis and Decision

I – Disciplinary or administrative?

[4] Several cases have addressed the issue of dismissal for non-culpable, or innocent, absenteeism (SHP 284, SHP 377, CROA 3556, CROA 4337, CROA 4477).

[5] Two types of such absenteeism can be distinguished. The first is the result of a single long-term disability, and the obligation to accommodate is usually engaged in such cases.

[6] The second is formed of a multitude of absences caused by different reasons, including short-term and long-term disability, which are unpredictable in nature but result in a higher-than-normal absenteeism rate. No accommodation is usually required in such cases because no single injury or illness can be identified and, therefore, accommodated.

[7] It is well recognized that when an employee has a high rate of absenteeism, the employer must meet two substantive requirements before discharge can be warranted.[1] First, the employer must demonstrate that the employee had an unacceptable level of absenteeism compared to his peers. Second, the employer must demonstrate that there was no reasonable basis to believe performance would improve.

a) Submissions of the parties

[8] The Union contends that this case is not a case of innocent absenteeism and that it is disciplinary in nature. One of the reasons for this position is that the Grievor

[1] See *Communications, Energy and Paperworkers Union of Canada, Local 30* v. *Irving Pulp & Paper Ltd.* 2013 SCC 34, CROA 5222, CROA 4840, etc.

was repeatedly asked by the Employer to “take all necessary steps to improve his attendance record.” The Union also recognizes that the Grievor’s absences were for multiple distinct causes.

[9] They also claim that because the Employer did not pay severance upon the termination of the Grievor’s employment, it clearly means that the process used was disciplinary and the Grievor was dismissed for just cause.

[10] The Employer submits that the process they followed in this case was not disciplinary but administrative in nature. This is how it was referred to in many of the letters given to the Grievor. The Employer argue that disciplinary measures are only imposed when an employee’s misconduct can be corrected or when an employee is responsible for the conduct to be corrected. When the conduct cannot be corrected by measures taken willfully by the employee or when it is not culpable, it must be dealt with in an administrative way, which is what they did in this case.

b) Jurisprudence

[11] This Office agrees with the decisions made by other arbitrators that clearly state that, in cases of innocent absenteeism, the Employer must take the administrative route (SHP-428, CROA 2656, CROA 4337). To decide if the measure to be taken should be disciplinary or administrative, what must be looked at is the culpable or blameworthy nature of the employee’s conduct (SHP-428 at p. 6). When an employee has a high rate of absenteeism for causes that he cannot control, sickness being the most common reason, it must be dealt with in an administrative way.

c) Findings

[12] What the Employer says to an employee in a meeting or in a letter does not change the fundamental nature of the conduct and, therefore, cannot be relied upon in deciding if the conduct was innocent or culpable.

[13] In this case, the evidence shows that the Grievor’s absences were mostly for fatigue, short-term sick leave or authorized unpaid leave. No one argues that the Grievor’s conduct was culpable; it is rather the process used that the Union

qualifies as disciplinary. Therefore, the fact that the Employer asked the Grievor to do his best to lower his absenteeism rate does not change the fact that his absenteeism was mostly non-culpable.

[14] Because the Employer was dealing with innocent absenteeism, they were correct in not following the disciplinary process provided in article 82 of the collective agreement.

[15] This reasoning also implies that the Employer did not violate section 239.1 of the *Canada Labour Code*. The Grievor was not dismissed because he took sick leaves; he was dismissed because he had an unacceptable rate of innocent absenteeism. The same is true for a potential violation of the *Canadian Human Rights Act*.

[16] Furthermore, the fact that the Employer did not pay severance upon the dismissal of the Employee also cannot change the fundamental nature of the conduct he was dismissed for.

[17] Considering all of the above, the Office finds that the process and dismissal in innocent absenteeism cases such as this one are administrative in nature and that the disciplinary process found in the collective agreement does not apply.

II- Two-step test

[18] As mentioned above, the jurisprudence of this board is clear that, in cases of dismissal for innocent absenteeism, a two-step test must be met. The employer must first show that the employee had an excessive rate of absenteeism and second that no improvement can be foreseen in the future (CROA 4477).

[19] The evidence clearly demonstrates that the rate of absenteeism of the Grievor is unacceptable and has been so for a long period of time. The fact that some errors were found in the data relied upon by the Employer does not significantly change the overall picture. The Employer’s evidence shows that the Grievor was absent for a total of 92 days over a period of 20 months, excluding annual leave and other authorized absences. Considering that conductors generally work an average of

160 days per year, the Grievor's annual absenteeism rate is slightly more than 34 %.

[20] Although neither the Employer nor the Union provided the general rate of absenteeism for workers in the same classification as the Grievor, the rates found in the jurisprudence vary from 5% to 11% (CROA 4337). Therefore, at more than 34%, the absenteeism rate of the Grievor is clearly "incompatible with the fundamental contract of service to the employer." (SHP-284, at p. 2)

[21] As for the second part of the test, nothing in the evidence provided by the Union shows that there is any hope that the absences will be reduced or will cease in the future. The absence rate of the Grievor has not gone down in the 20 months since he was first met by the Employer and remained excessive all through this period. Therefore, an inference can be drawn that there will be no improvement in the future.

[22] Considering all of the above, this Office is satisfied that the two requirements for innocent absenteeism have been met by the Employer, and that no violation of either the *Canada Labour Code* or the *Canadian Human Rights Act* occurred.

For all the reasons set above, the Office of Arbitration:

REJECTS the grievance.

January 29, 2026

MAUREEN FLYNN
ARBITRATOR