CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4534

Heard in Montreal, January 12, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Trainee Dan Popescu of Revelstoke, BC.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

While engaged in the New Hire Training Program, on September 11, 2015 Mr. Popescu was required to take part in a timed handbrake test. Following the test, Mr. Popescu was offered the opportunity to resign, which was declined. He was then informed he was dismissed, and was provided a letter on October 9, 2015 confirming the termination.

The Union contends that Mr. Popescu's dismissal is entirely unwarranted, excessive and discriminatory in all of the circumstances. The Union and Grievor had not been advised by the Company of any performance concerns whatsoever prior to the timed handbrake test being administered. In these circumstances, the termination is seen to be arbitrary and/or in bad faith.

The Union further contends there is absolutely no known existing policy regarding timed handbrake application testing. Additionally, the test does not form part of the training program, is arbitrary, discriminatory, contrary to arbitral jurisprudence including the KVP standard and irrelevant to the Conductor training process. As a result, the Union asserts the Company has failed to meet the burden of proof related to any allegation that Mr. Popescu failed to complete the requirements of the New Hire Training Program.

The Union submits the Company has violated CP's Discrimination and Harassment Policy (1300), Article(s) 36 and 70 of the Collective Agreement, the *Canadian Human Rights Act*, the *Canadian Charter of Rights and Freedoms*, and the *Canada Labour Code*.

The Union requests that the discipline be removed in its entirety, that Mr. Popescu be ordered reinstated forthwith without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. 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:

C. Clark	– Assistant Director Labour Relations, Calgary

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
M. Biggar	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
J. Kiengersky	– Local Chairman, Revelstoke
D. Popescu	– Grievor, Revelstoke
W. McCotter	– Local Chairman, Edmonton
J. Hnatiuk	– Local Chairman, Port Coquitlam

AWARD OF THE ARBITRATOR

This arbitration concerns the discharge of Conductor Trainee Dan Popescu following a performance review on September 11th, 2015.

Originally from Calgary, Alberta, the Grievor had started the Railway Conductor Course at the Southern Alberta Institute of Technology ("SAIT"). A month prior to the program's conclusion, CP conducted interviews at the SAIT and, after deeming Mr. Popescu fit for the position of Conductor, hired him in April 2015. The Grievor was informed that his training would start at Revelstoke, British Columbia.

Article 36 of the Collective Agreement pertains to the training process. After passing written evaluations, the trainee is to go through the phase of Qualification, which comprises of instruction and on-the-job training, and then proceed through Familiarization. The latter is intended to "familiarize the trainee on the job that the trainee will work when the program is completed", as per article 36.07(2). The training program is jointly reviewed by the Union and the Company before its beginning (article 36.07(3)).

On the morning of September 11, 2015, Mr. Popescu reported to work and attended the debriefing. Then, Trainmaster Donovan Gentles removed the Grievor from his crew and took him to the Revelstoke Yard. Upon arrival, Mr. Gentles advised the Grievor that he was to perform a timed handbrake test, having to secure 25 handbrakes in 30 minutes. Upon securing 10 handbrakes, the Grievor told Trainmaster Gentles that he was feeling tired and the test was stopped. Mr. Popescu was then informed that he failed the test and would either have to resign or be discharged from the Company. Taken by surprise, the Grievor asked if he could undergo the test again, which the Company refused. On the same day, the Grievor was issued a letter, dismissing him from Company service.

The Union asserts that the test and the subsequent dismissal of the Grievor were unwarranted, excessive and discriminatory. It argues that the test is not part of any known existing policy regarding handbrake testing and is irrelevant to the Conductor training program.

The Company holds that it took its decision based on an overall assessment of the Grievor's work habits, attitude and performance during his training. It also affirms that Mr. Popescu was a probationary employee and that it could rightfully dismiss him for the reasons mentioned thereof.

The Conductor training program's steps are, as outlined above, developed jointly between the Union and the Company. Although article 36.07 of the Collective Agreement allows the Employer to come up with initiatives of its own, the program is highly structured and has a clear, established and measurable criteria, as evidenced by the numerical evaluations used to gauge the trainees' progression.

While the Employer claims that it based its decision on an overall assessment of the Grievor's performance, it mainly refers to the September 11th test to justify its decision. The Company recognises that the test is not part of its policy, but argues that it is a performance based instruction to evaluate the proper and efficient application of a car's handbrake.

The Company asserts that the test was applied regularly to other employees, yet it did not provide any evidence to suggest that it is the case. Conversely, the Union holds, that statement was never challenged by the Company, that it has never seen any Company policy, guideline, doctrine or anything of the sort that requires employees to perform a handbrake test in a timed manner. In fact, the Union is only aware of another similar case where, following a timed handbrake test failure, the employee had been discharged, but was later reinstated following a grievance.

The evidence also shows that the Grievor's handbrake proficiency had been evaluated six times over the course of his training and that the Grievor was within what is usually expected of Conductor Trainees. Of the six times he was evaluated, the Grievor

was deemed to have achieved the standard on two occasions. Nothing in the evaluations suggests that the Grievor had any particular difficulty with the application of handbrakes which would justify a special timed test from the Company.

Mr. Popescu, having been hired under the Company's New Hire Program, was a probationary employee at the time of dismissal. Concerning trainees, article 43.01 of the Contract states the following:

> "A new Brakeperson shall not be regarded as permanently employed until after six months cumulative service from the date of making first pay trip, and, if retained, shall then rank on the Master Seniority List from the date and time they commenced their first pay trip. In the meantime, unless removed for cause, which, in the opinion of the Company renders themselves undesirable for its service, the Brakeperson shall be regarded as coming within the terms of this Collective Agreement."

Arbitrator Picher, In **CROA&DR 1568**, held that the Company's discretion in the appreciation of a probationary employees' performance does not grant total freedom to the employer in regards to their termination:

> "It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question."

Probationary employees, moreover, are entitled to a fair trial of their competence for the job they are training for; the Employer's standards and expectations must be

communicated to the employee so that they can reasonably try to meet them[1]. Additionally, the factors taken into consideration by the employer must be relevant to the future position of the probationary employee.[2]

In the present case, the evidence presented demonstrates that the timed handbrake test was arbitrary and designed to be failed by the Grievor. It is apparent that the test was improvised, as it is seldom administered and not part of the joint training preparation. By the Company's own admission, timeliness when applying handbrakes is not a factor relevant to the position the Grievor was training for. Rather, the Employer claims that Mr. Popescu was told that he would be timed in order to make him focus on the task at hand. This justification is simply untenable. The fact that the Company refused the Grievor try a second time and that he was immediately dismissed on the day of the incident suggests instead that the test was administered to incur failure, thus legitimatising the Company's decision to dismiss him.

As such, I find that the decision to discharge Mr. Popescu was arbitrary and clearly unwarranted. The timed handbrake test was unwarranted as it goes against the rules and objectives established by the jurisprudence for this sort of evaluation, which are supposed to fairly and reasonably assess a probationary employee's competence.

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[1] *Jeanne Sauve Family Services* v. *PSEU*, [2004] CarswellOnt 621 (Ontario Arbitration); *Lac des Iles Mines Ltd.* and *USW, Local 9422, re*, [2015] CarswellOnt 2285 (Ontario Arbitration)

[2] *Canadian Forest Products Ltd.* v. *P.P.W.C., Local 25*, [2002] CarswellBC 3335 (British Columbia Arbitration).

As for the Union's claims of discrimination and harassment, it is insufficiently substantiated by the evidence. Nothing in the Company's actions lead to the belief that the Grievor's dismissal had to do with an alleged discrimination.

To support its pretentions, the Union asserts that, following an incident in August 2015 during which the Grievor suffered from heatstroke and dehydration, a supervisor allegedly told Mr. Popescu, after his dismissal, that they thought he had a respiratory disease. The Union also adds that in the other previously mentioned instances where the Company had assessed a similar test to an employee in order to dismiss him, that employee also was overweight and it was the reason of the dismissal. The Union thus arrives at the conclusion that Mr. Popescu's dismissal was based on a perceived disability from the Employer, either because of his weight or a respiratory disease.

With all due respect, the evidence adduced by the Union is insufficient to reasonably allow such an inference. Whilst it is clear that there was animus towards the Grievor which resulted in the impromptu test, that alone is not enough to allow the Union's demand for additional damages. There seems to have been many motivations behind the Company's decision and it does not flow from the facts that the Company discriminated against the Grievor because of a perceived disability; the Union's two unrelated examples do not suffice.

Therefore, for the above-mentioned reasons, the grievance is allowed. Mr. Popescu is to be reinstated into employment as a Conductor Trainee, with compensation for all lost wages and benefits.

I shall remain seized in the event of any difficulty arising from the application of this award.

January 31, 2017

MAUREEN FLYNN
ARBITRATOR