CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4530

Heard in Montreal, January 11, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of a 30 day suspension, and discharge of Mr. R.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on March 29 2016, Mr. R was assessed a 30 day suspension without pay for "communicating inaccurate results of an inspection of train 246-03 during your tour of duty beginning on March 3, 2016. A violation of: Improper reporting".

The Union's position is that a 30 day suspension in this matter is excessive in all circumstances. The train experienced an unsolicited emergency brake application and Mr. R, as per rule, inspected the movement. Mr. R corrected a broken knuckle on his train thirty one cars back from the locomotives. The locomotive engineer could not recover the air and Mr. R continued to inspect and discovered a broken drawbar a further 30 cars back from the lead locomotive. At this point, the RTC asked what was happening, and Mr. R described the situation. Due to darkness, ice, and curvature of the track, it appeared to Mr. R that the train wheels were not positioned properly on the track and he was then instructed to take the portion of his train that could safely move to the next siding location. Upon inspection by a wayside foreman that was dispatched, the condition of the train was found to be as Mr. R described in regards to the broken knuckle and broken drawbar, but not the incorrect position of the wheels. This was a simple misjudgement on Mr. R's part however he took the safest course of action as prescribed to secure the scene. It is unfair to harshly discipline a conscientious employee who erred on the side of safety. No damage or injury resulted because of his cautious actions. It is the Unions belief that he was unfairly disciplined for train delay, and productivity should not trump safety.

The Union requests that the grievance be allowed, the 30 day suspension be removed from Mr. R's record and that he be made whole including lost earnings/benefits incurred with interest with no loss of seniority. 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.

Discharge

In addition, following an investigation, on March 29 2016, Mr. R was dismissed from the Company's service with the following notification, "Please be advised that you have been

DISMISSED from Company Service as you have breached the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline record and the culminating incident of your conduct unbecoming of an employee when you failed to follow the instructions of a supervisor when you refused to submit to a required Drug and Alcohol test on March 4, 2016. A violation of: OHS Policy 4100 and OHS 5100 item 3.2.3 & 3.2.5"

The Union's position on the dismissal of Mr. R is that the penalty "dismissal" is excessive in all circumstances. Mr. R admitted and apologized for not submitting to the drug test as he made the decision that morning while fatigued as he was on duty for 15 hours. During the investigation he admitted to smoking marijuana five days prior while on sick leave as he felt it would help him. Mr. R performed his duties that day prior to finding the broken drawbar and no abnormalities were noticed in his behaviour nor in his conversations with the RTC. Moving in a positive direction, Mr. R has sought ongoing treatment and is volunteering in his community. Mr. R suffered from a disease which is recognized by the *Canadian Human Rights* and CP Rail. The Company has a duty to accommodate Mr. R with his disease. A disease that is manageable with counselling, programs and support which will allow Mr. R to be a positive contribution to himself and those around him. Mr. R having first started in 2000 with the Maintenance of Way department transferred in 2002 to become a Trainman/Conductor/Locomotive Engineer and has continued in this role until his dismissal.

The Union requests that the grievance be allowed and the discipline removed in its entirety, that Mr. R be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. The Union further request that he be accommodated as per Company Policy for Workplace Accommodation, the *Canadian Human Rights Act*, and the Commission's Workplace Accommodation. 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: **FOR THE COMPANY:**
(SGD.) W. Apsey **(SGD.)**
General Chairperson

There appeared on behalf of the Company:

C. Clark	– Assistant Director Labour Relations, Calgary
B. Scudds	– Manager, Labour Relations, Minneapolis

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
M. Biggar	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smith Falls
R. R	– Grievor, Mactier
D. Psichogios	– Vice General Chairman, Montreal
C. Yeandel	– Vice General Chariman, Montreal
J. Campbell	– General Chairman, Peterborough
S. Brownlee	– General Chair, Stony Plain
P. MacDonald	– Local Chair, Montreal

AWARD OF THE ARBITRATOR

The present arbitration concerns the assessment of a 30-day suspension for improper reporting and dismissal for refusing to submit to a drug and alcohol test of Conductor R.

The Grievor started working at CP when he was eighteen years of age and has remained with the Company for some fourteen years. Mr. R is a third-generation employee, his grand-father and father have both worked for CP their entire lives. Prior to the events in question, the Grievor had accumulated 70 demerits but had not been disciplined since 2012.

On the day of the incident, March 3, 2016, the Grievor's crew was operating train 246-03 between Sudbury and Mactier yard. At 23:45pm, while running the CN Bala Subdivision, the crew experienced an undesired emergency brake application at a curvature in the track.

Upon walking the cars, Mr. R noticed a broken knuckle 31 cars back, which he replaced with the Locomotive's Engineer assistance. After cutting the air back in, the crew noticed that they still were not getting air back. The Grievor then proceeded to inspect the cars again and found a broken drawbar.

As Mr. R kept inspecting the train, he believed to have noticed that the wheels of the train were over the rail. The Grievor reported to the CN, and later CP, RTC that several

of the wheels' flanges were sitting on the rail. This being a very serious problem, the Grievor was asked numerous times to explain clearly what he was seeing before the Company could dispatch the proper personnel. The radio communications transcripts read, in part:

> "246(R) [R] There's wheels on top of the rail, you might as well say we are on the ground here. This train is not moving behind that drawbar. That probably caused the drawbar … there's wheels on top of the rail here. Before I go any further, there are two cars that has wheels on top of the rail
>
> CN Chief: Wheels on top of the rail as in … you got cars that have derailed there? Over.
>
> 246(R) It's on top of the rail the wheels are on top of the rail, like literally. It is not sitting properly… um…. Over.
>
> CN Chief: I am sorry, I am not exactly following you here… um… like… wheels on top of the rail as in … part of the rail has rolled, or the flanges aren't in the correct spot there? Over.
>
> 246(R): The flange ain't in the right spot. The whole wheel is riding on top of the rail… like, the flange isn't right. You definitely need somebody out here.
>
> […]
>
> CN Chief: Okay, you think the drawbar dropped and it was dragging and that is when it went into emergency and got the knuckle after the fact. Okay. And ah, so I am trying to visualize this here, so basically the flange is sitting on top of the rail head. That is what you guys are seeing over there? Over.
>
> 246(R): pretty much every car behind that drawbar has climbed the rail. Every car I seen to the tailend… on the east side mostly.
>
> CN Chief: Okay, so just about every car to the tailend there and mostly on the east side. Does it look like the rail is spread a bit causing this? What do you think? The gauge is looking fine? Over.
>
> 246(R): It is possible. I am not a Maintenance of Way guy, but that is possible it could even have rolled a bit there. It is just impossible to tell with all the snow."

When CN Track Maintenance Foreman Pete Murdoch arrived on the scene, he could find no issues or anomalies as reported by Mr. R. As later confirmed, there was nothing wrong with the wheel-rail interface besides the broken drawbar.

When it was realised that the Grievor provided fundamentally incorrect information, the Company decided to test the Grievor for the presence of drug or alcohol in his system.

The Grievor was taxied to the Mactier Station in order to proceed to the testing. Upon arrival, Mechanical Manager Dave Purdon informed Mr. R of the Company's decision to test him based on Post Incident/Accident testing protocol. While Mr. R initially agreed to the testing, he subsequently refused and to it and, after unsuccessfully trying to reach the Union for advice, went back home despite warnings of the potential consequences of his refusal by Mr. Purdon.

A few days later, after speaking with the Union, the Grievor attended a testing facility on March 7, 2016, and tested non-negative for Cannabinoids (THC). The Grievor later underwent another test on March 30, which was negative for all substances.

On March 29, following an investigation that took place on March 10, the Grievor was assessed a 30-day suspension for having communicated inaccurate information the night of the incident. Also on March 29, subsequent to a separate investigation that took place on March 18, Mr. R was dismissed from the Company for having failed to follow a supervisor's instruction to submit to drug testing.

Following his discharge from the Company, the Grievor attended his physician's office to obtain a referral to the Royal Victoria Regional Health Centre's Mental Health & Addiction Day Program. Having obtained a referral from his physician, the Grievor applied to the Program and, after being put on a waiting list, began the Program on August 23, 2016 and was discharged on September 29, 2016. The Health Centre's Program is, as stated on the Grievor's confirmation of attendance letter:

> "[…] 6 week, 3 day a week, group based program, (9:30 am – 2:00 pm, Tuesday. Wednesday, Thursday), focused on understanding and coping with mental health and addiction symptoms and encouraging wellness, relapse prevention, and healthy recovery. Individual counselling sessions can be scheduled as needed."

The Grievor also attended the regional chapter of Narcotics Anonymous since April 12th, 2016, and has attended sessions until January 17th, 2017. In total, the Grievor has attended over 40 meetings during that period. The Grievor's sponsor, Mr. Roy R., stated the following in a letter dated December 3rd, 2016:

> "I've belonged to a group called New Beginnings (NA) for [the] past 5 years. I'm grateful to have R as a Sponsee. We work hard together during and after meetings mostly on steps of NA. I [am] happy to see how well his progress has been in this program. I believe he will continue his hard work in recovery."

The Union began the grievance procedures on May 12, 2016 and now the matter is properly before this Office.

The Union claims that the suspension is excessive, that the Grievor, due to the darkness, snow and curvature of the track, made a simple misjudgement and took the

safest course of action. As for the dismissal, the Union argues that it is was excessive in all circumstances. It asserts that the Grievor admitted and apologized for not submitting to the drug test, a decision he took while fatigued. The Union also holds that the Grievor had smoked marijuana five days prior to the incident, that he has since undergone treatment for his disability which grants him protection under the *Canadian Human Rights Act*. As such, the Grievor should be reinstated and accommodated for his disability.

The Employer asserts that the suspension was warranted and reasonable. The Grievor's experience makes his mistake inexcusable and his bad judgement call forced CP to dispatch resources and caused delays to operations. Concerning the dismissal, the Company asserts that it was reasonable since refusing to submit to a substance test is a grave violation and the Company and can reasonably infer that the Grievor was under the influence during the time of the incident. It adds that the Union has not proven the Grievor's alleged disability as it did not submit expert medical information to support this claim.

Concerning the erroneous report made by the Grievor, I find his and the Union's explanations lackluster. Mr. R has the experience and should have the expertise to properly assess the sort of situation he was in, which is required in his position of Conductor. The Grievor reported a serious and dangerous condition that did not exist. It is noteworthy to add that the Grievor was a Maintenance of Way employee for two years during his career, which adds to the gravity of his mistake.

Thus, there is no reason to reduce the 30-day suspension assessed.

I now turn to the dismissal of Mr. R following his refusal to submit himself to a drug and alcohol test on the early morning of March 5th.

As stated by the Employer, it is important and legitimate for railway companies to maintain a drug free environment in order to ensure the safety of the public and their employees. This has been confirmed by jurisprudence of this Office, most notably in the words of arbitrator Picher in **CROA&DR 1703**:

> "[...] an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test."

Indeed, the refusal of an employee to subject himself to a drug test can cause the Employer to draw an adverse inference from this decision. In **CROA&DR 3581**, Arbitrator Picher stated that:

> "There is, however, one important distinguishing factor on the facts. It is not disputed that the grievor refused to undergo an alcohol and drug test when directed to do so. I am satisfied that the request made to the grievor was entirely appropriate and in keeping with the Company's policy of administering alcohol and drug tests in appropriate situations where there has been an accident or incident. […]
>
> When confronted with the order to take a drug and alcohol test, whatever his own feelings, it was the grievor's obligation to "obey now – grieve later" if he felt that the directive was somehow unfair. By refusing to undergo a drug test, in the Arbitrator's view, Mr. Alexander radically changed the nature of his own infractions over the course of these events, and rendered himself liable to a more severe degree of discipline. Whatever his personal feelings, his refusal to take an alcohol

> and drug test in the circumstances does leave him open to the drawing of adverse inferences, and does little to bolster his credibility."

Arbitrator Picher, in the previously cited **CROA&DR 1703**, also stated that:

> "In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril."[1]

In the present case, given the Grievor's erroneous account and his refusal to undergo drug testing, the Company has reasonably inferred that Mr. R was under the influence during the events of March 3rd, 2016, which prompted his dismissal.

As previously mentioned, the Union argues that the Grievor suffered from a disability at the time of the incident, namely, drug addiction, and that he was unjustly disciplined for that disability, contrary to the *Canadian Human Rights Act*.

It the Union's onus to prove, on the balance of probabilities, that the Grievor had indeed a disability at the time of the incident and that there is a connexion – or causal link – between the disability and the violation that incurred discipline.[2]

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[1] See also **CROA 3609**

[2] *Health Employers Assn. of British Columbia* v. *B.C.N.U.*, 2006 BCCA 57, 2006 Carswell BC 292; and **AH638**

The Employer claims that an expert medical opinion must be presented in order to prove the Grievor's disability. A review of the jurisprudence suggests otherwise.

As stated by arbitrator Picher in **CROA&DR 2716,** drug addiction is a recognized disability that requires accommodation and which can be demonstrated through "clear and compelling evidence of an addictive condition":

> "Both legislation in Canada, such as the Canadian Human Rights Code, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge. Any other approach would, in my respectful view, run contrary to current statutory standards which prohibit discrimination on the basis of an illness such as alcoholism or drug addiction, and specific statutory provisions which now compel employers and unions alike to explore means of reasonable accommodation for persons so afflicted."

In *Prince Albert Parkland Health Region* and *CUPE, Local 4777 (Storey), Re*[3], the majority of the board of arbitration presented a number of decisions where expert medical evidence was not required in order to prove a pattern of addiction. Indeed, the arbitrators found that it was preferable for the Union to adduce expert medical evidence, but that it did not constitute a *sine qua non* condition. The board itself was not presented

[3] [2016], (Saskatchewan Arbitration). See also: *Shelter Regent Industries* v *Industrial, Wood and Allied Workers of Canada, Local 1-207*, [2003], 124 LAC (4th) 129; *Public Service Alliance of Canada* v *Saskatchewan Gaming Corporation*, [2015] SLAA No. 27 (Alberta Arbitration).

any such evidence but nevertheless concluded to the existence of a disability from other means of medical and non-medical evidence.

In the present case, I am satisfied that the Grievor did suffer from a disability during the time of the incident. The evidence shows that the Grievor, after obtaining a referral from his physician, attended an intensive six-week long program in a health care centre to treat his addiction problem[4]. Mr. R has also attended over 40 narcotics anonymous meetings since August, 2016. The Grievor's effort undoubtedly "demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition" as arbitrator Picher wrote in **CROA&DR 2716**, cited above. He did not simply visit a help center on a few occasions, but has put valiant efforts into his recovery.

As for the causal link or nexus, it can be easily drawn here as the Company terminated Mr. R based on the inferred assumption that he refused to undergo the drug test because he was under the influence. The disciplined misconduct of being under the influence while on duty is quite obviously linked to the medical condition of drugs addiction.

[4] The website of the Royal Victoria Regional Health Centre states that in order to be admitted, individuals must first obtain a referral from a physician or nurse practitioner. Additionally, during the program, each client is assigned a "Primary Clinician" and "care is managed by an inter-professional treatment team."

It must be underlined, however, that the Grievor should have not refused to submit himself to post-incident drug and alcohol testing. In doing so, Mr. R exposed himself to discipline. The Grievor's explanation that he was tired and could not think straight does not condone or justify his actions.

Therefore, for all the above-mentioned reasons, the grievance is allowed in part. The 30-day suspension is upheld. The dismissal shall be removed from the Grievor's record and he shall be reinstated forthwith without loss of seniority, but without compensation for lost wages and benefits, and subject to the following conditions. The Grievor will have to abstain from the consumption of alcohol and non-prescription drugs for a period of two years during which he shall be subject to random alcohol and drug testing, administered by the Company in a non-abusive manner. During the same period, the Grievor shall also keep attending Narcotics Anonymous meetings, or any other organization, with his attendance at such meetings to be confirmed on a quarterly basis to the Company in writing by a responsible officer of that organization. Should the Grievor fail to honour these conditions, he shall be liable to discharge.

I remain seized in the event of any difficulty that may arise from this decision.

January 26, 2017

MAUREEN FLYNN
ARBITRATOR