AH 712

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(The "Company")

- and -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)

(The "Union")

Re: Cody Hamon Dismissal

Arbitrator
Richard I. Hornung, Q.C.

For the Company
Diana Zurbuchen – Manager Labour Relations
Francine Billings – Manager Labour Relations
Jodie Sokolosky – Assistant Director S&C Operations
Cory Wogrinc – Assistant General Manager S&C Operations

For the Union
Denis Ellickson – Counsel
Lee Hooper – General Chairman
Brad Kauk – Regional Representative
Randy Roberts – Local Representative
Cody Hamon - Grievor

Hearing
December 1, 2020
Calgary, Alberta

I

1. On March 30, 2020, following an investigation by the Company, Cody Hamon (the "Grievor") was dismissed from Company service for the following reasons:

> *… While working as an S&C Mobile Maintainer on February 19, 2020 you entered a six month grade crossing inspection into Raildocs as compliant when the work at Mile 4.78 on the Outlook Subdivision was not completed. A violation of Red Book of S&C Requirements, Section 9.3.4 (c). Notwithstanding this violation in and of itself warrants dismissal, based on your previous discipline history and terms of your Last Chance Agreement dated September 30, 2019, this incident also constitutes a culminating incident and violation of the terms of your Last Chance Agreement, warranting dismissal.*

2. A summary of the rules violated were listed as:

> *Red Book - S&C requirements -9.3.4(c); and, Agreement – Last Chance Agreement – 3(d).*

3. On February 19, 2020, the Grievor performed a 6-month Grade Crossing Inspection at mile 4.78 of the Outlook Sub. In his report, the Grievor confirmed that he conducted the required inspections. He entered his initials in the log book confirming the completion of the same (Q.20). Thereafter, he entered a 6-month Inspection Report into RailDocs.

4. S&C Maintainers are required to record the time and date when they activate a crossing (with a test key) in the test key log books that are kept at crossings. Thereafter, they must submit Inspection Reports which are comprised of a checklist of equipment and systems that they are required to inspect. Finally, these reports must be uploaded into the RailDocs system using their laptops.

5. In Q.23 and Q.24, the Grievor confirmed that when he conducted his inspection, defective bonds were apparent. That fact notwithstanding, he completed the 6-month test documents and marked the location as compliant.

6. The following exchanges occurred:

> *Q.23 Referencing Appendix G and H, please tell me what you see in the pictures.*
> *A. Broken tiger bond which we previously discussed and two broken cadwell bonds.*
>
> *Q.24 … Please explain why you show a completed 6 month test on Appendix C*
> *A. That was an error in judgement, I was distracted by some personal issues and I made a mistake.*
>
> *Q.30 Do you understand that entering a test compliant when it's not may be viewed as falsifying regulatory inspections?*
> *A. Yes*

7. After acknowledging the above, the Grievor provided a copy of an email he sent to his supervisor on November 15, 2019 stating:

> *Hey just wanted to update you, Daniel and I tested Dustin's switches at MJW (Moose Jaw West) but we could not find a cup gauge for the latch out tests, I will sink them up hold for completion until we can get those tests complete*

8. He suggested that his email: "*demonstrates that I am unwilling to intentionally input a test that is not complete*".

9. He provided a further email, dated February 7, 2020, wherein he advised the Company of: *"…the* things *I currently still need that cannot be purchased through Acklands"*. The list includes 8 items.

10. The Grievor explained that he did not repair the defective bonds because he lacked the proper tools at the time of his inspection. He allowed that if he had the tools the entire issue would not have arisen:

> *… At the time on February 19, 2020, I was not properly equipped and I remain improperly equipped as of this statement. I have made repeated requests both verbally and through email to Manager Francis Ramos and Manager Elwyn Goulding to get me the required tools and equipment. Had I been properly equipped this would not have been an issue and the bonds would have been replaced.*

11. Finally, at Q.37, he was asked:

> *Q.37. Do you understand that if you could not make the repairs to the defective bonds on February 19, 2020 at Mile 4.78 Outlook Sub that you should have held the test for completion once the bonds were repaired?*
>
> *A. Yes I do, as previously mentioned, I was distracted and I made an error. As stated in the email dated November 15, 2019, I have demonstrated that I have done this previously and understand it.*

12. With respect, I do not find the Grievor's explanation, regarding the lack of tools, to be a credible justification for his falsification of the records. While I accept that he did not have the necessary tools to make the necessary repairs at the time, that is not the crucial issue. The critical issue is his failure to accurately, or properly, report the results of his inspection. He could easily – as he done previously – have reported the deficiency and noted his intention to repair it. Furthermore, it is notable that on two occasions he gave his reasons for entering the false report as being: *"an error in judgement*" and a "*mistake"* brought about by "*personal issues*" which – despite being given two opportunities – he refused to elaborate on.

II

Supplementary Investigation

13. The Union argues that the supplementary Investigation, on March 26, 2020, was held for *"… for the sole purpose of proffering evidence that was available to the Company during the initial investigation*". In doing so, the Company breached its obligation to conduct a fair and impartial investigation in accordance with *Article 12* of their *Wage Agreement*. It asserts that employees must be made aware of any evidence that could be held against them before they give their statement. Accordingly, the Company was obligate to put the Grievor on notice that it was relying on the Reinstatement Agreement (the "LCA") - signed by the Grievor on September 30, 2019, (Union Tab 2) - prior to the commencement of the initial investigation. It suggests that when the Grievor provided his initial statement, he was entirely

unaware that the Company was considering the incident, on February 19, 2020, as a potential breach of the LCA.

14. At the supplementary investigation, the Company – over the objection of Mr. Kauk, the Union's representative – raised the LCA for the first time. Mr. Kauk's objection was based, *inter alia,* on his understanding of a 2007 edition of a Company Handbook, which advised that a supplementary investigation should only be held when "*new information*" had been brought forward during the investigative process.

15. The Union objected to the admissibility of both the Handbook information (in that the document was only produced by the Union prior to the hearing) and, its relevance (in that the Company's policy had changed numerous times since 2007, and the proffered "Handbook" no longer represented its position at the time of the Grievor's investigation).

16. The *Wage Agreement* between the parties provides:

> *12.1 An employee shall not be disciplined or dismissed without having had a fair and impartial investigation and his responsibility having been established. ...*
>
> *12.2 When an investigation is to be held, the employee will be provided forty-eight (48) hours written* ***notice of the time, place and subject matter of such hearing.*** *He will have a union designated fellow employee and/or an accredited representative of the Union present at the hearing* ***and shall be furnished with a copy of his own statement and, copies of all evidence taken****, which will also be supplied electronically to an accredited representative...*

17. While it directs that a grievor be given notice of the "time, place and subject matter" of the hearing, Article 12 lacks any language which restricts the specific manner in which an investigation, or a supplementary investigation, is to be conducted - other than the overarching requirement, in Article 12.1, that it be fair and impartial. The convening of a second investigation, in and of itself, does not constitute grounds for concluding that the entire investigation was tainted by a lack

of fairness or impartiality. There is no prohibition, against raising evidence/facts at a supplementary hearing unless: such facts/evidence do not relate to the "subject matter" identified in the notice required by Article 12.2; or its introduction breaches the essential elements of a fair and impartial investigation.

18. In **CROA 2073** Arbitrator Picher confirmed the standards to be met to ensure a fair and impartial investigation:

> *…disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration.* ***What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements****, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements,* ***coupled with the requirement that an investigating officer meet minimal standards or impartiality*** *are the essential elements of the "fair and impartial hearing" to which the employee is entitled to prior to the imposition of discipline****...***
>
> *(Emphasis added)*

19. In each case, it is left to the arbitrator, applying the essential elements of a fair and impartial hearing, to determine whether a grievor knew (1) the accusation against him; (2) the identity of his accusers; (3) the content of his accusers' evidence or statements; and was (4) given a fair opportunity to provide rebuttal evidence in his own defence.

20. Although the Company did not include the LCA in the original Investigation Notice - and it was not evidence related to the specific incident that was the subject matter of the investigation - raising it at the supplementary investigation did not taint the entire investigation. There was no obligation for the Company to refer to the LCA in its initial notice or investigative meeting, in order to rely on it for disciplinary purposes. The rights and obligations of the parties in the LCA are set out in therein; they exist, and subsist, independently of an investigation called to enquire into an alleged breach of a Company policy.

21. Furthermore, reference to the Grievor's LCA does not equate with adducing new evidence at his investigation. Here, the Grievor signed the LCA on September 30, 2019 and the subject incident occurred on February 19, 2020. He was aware – or reasonably should have been – of its existence; its terms; and his obligations thereunder. It would be naïve to conclude otherwise. In point of fact, raising the LCA provided the Grievor with an opportunity to address it and, perhaps, influence the Company's decision regarding the appropriate discipline, should he be found to have breached the *Red Book* as alleged.

22. In the result, I conclude that the Investigating Officer met the standard of a fair and impartial investigation when he conducted the second investigation - both to seek a further explanation of the "personal issues" at play for the Grievor when the incident occurred, and to canvass the LCA which the Company might take into consideration when imposing appropriate discipline.

III

Last Chance Agreement

23. As set out above, on September 30, 2019, the parties entered into the LCA. In that agreement the Grievor agreed to the following provisions:

> *3. In addition to any terms and conditions arising from the above, the employment of Mr. Hamon will be subject to the following additional terms and conditions:*
>
> > *d. Mr. Hamon shall have **zero safety related incidents for the duration of this Agreement.** Any safety-related incident for which Mr. Hamon is found culpable of through a fair and impartial investigation shall result in his dismissal from Company service.*
>
> *9. If, following a fair and impartial investigation, the Company determines that Mr. Hamon violated or failed to comply with any of the terms and conditions of this Agreement:*
>
> > *a. It shall be considered just cause for the termination of the employment of Mr. Hamon;*

> *b. The Company, in its sole discretion, may elect to dismiss Mr. Hamon from Company service or impose a lesser disciplinary penalty;*
>
> *c. Any grievance regarding the discipline assessed shall only be for the purpose of determining whether Mr. Hamon violated or failed to comply with the terms and conditions of this Agreement.*

24. In **CROA 2743** the following observation is made by Arbitrator Picher regarding the dismissal of an employee for violation of a Last Chance Agreement.

> *This Office can see no responsible basis upon which to reverse that decision. The ability of employers and unions to make individual employees, whatever their personal problems, subject to strict conditions as a requirement of their continued employment is an instrument of great importance whose credibility should be sustained by employers, unions and arbitrators alike. In CROA 2632 the rationale for the reluctance of arbitrators to interfere with the consequences of the violation of such conditions was expressed in the following terms:*
>
> > *To [interfere] would be tantamount to disregarding or amending the conditions agreed to between the parties, …As a matter of general policy, such settlements should be encouraged. As reflected in Canadian arbitral jurisprudence, arbitrators do not interfere with the terms of such settlements, as to do so would tend to discourage parties from resorting to them and, ultimately, undermine their utility as an important instrument for resolving disputes. …*
>
> (See also **CROA 4675)**

25. Paragraph 3(d) provides that the Grievor "*shall have zero safety related incidents"* during its duration and directs that he may be subject to dismissal in the event his culpability, for the same, is established. The Company dismissed the Grievor after determining his culpability in a safety-related incident.

26. Paragraph 9(a) directs that a breach of the LCA shall constitute "*just cause*" for termination; and, 9(c) restricts my jurisdiction to: "… *determining whether Mr. Hamon violated or failed to comply with the terms and conditions of this agreement*".

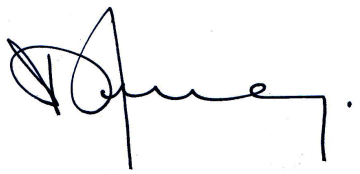
27. The evidence established that the Grievor's conduct, in falsifying the records, was a safety related breach for which the Grievor was culpable and deserving of discipline. The Company retained the "*sole discretion*" to terminate his employment or impose a lesser penalty. It chose to dismiss him.

28. The LCA provides that a breach of its conditions is to be considered just cause for termination. Equally, it restricts my jurisdiction to the determination of whether a breach of the LCA existed and, if so, excludes my prerogative to impose a lesser penalty. The agreement of the parties, as set out in the LCA, ought therefore to be enforced according to the clear intentions expressed. For that reason, I dismiss the grievance.

29. The Company also argued, in the alternative, that the Grievor's falsification of records was, in and of itself, a dismissible breach and constituted a culminating incident which, based on the Grievor's record, warranted dismissal. Unfortunately for the Grievor, I must agree. The Grievor's unenviable disciplinary includes a previous suspension, in April 2018, for entering false Regulatory Testing into RailDocs without completing the tests. The Grievor was aware (as per his email of November 15, 2019) of his responsibilities with respect to safety sensitive reporting. Accordingly, even leaving aside my determination on the LCA aspect of this case, I would have concluded that his dismissal was warranted.

30. Accordingly, the grievance is dismissed.

Dated this 3rd day of February 2021.



RICHARD I. HORNUNG, Q.C.
ARBITRATOR