CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4653 & 4654

Heard in Montreal, October 15, 2018

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE (4653):

Appeal on behalf of Conductor F.A., concerning the assessment of fifteen demerit marks for violation of CRO Rule 104.5 while working as the Brakeman on Assignment L55551-15 on November 15, 2017, resulting in the derailment of NCLX 3254 at Red Deer Interchange", and subsequent discharge for accumulation of demerit marks in excess of sixty.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE (4653):

On November 15, 2017 the grievor was called as the brakeman on L55551-15 assignment in Red Deer, Alberta. During this assignment the grievor's movement went over a derail, derailing NCLX3254.

The grievor was required to provide an employee statement with respect to the aforementioned incident and was subsequently assessed fifteen demerits for violation of CRO Rule 104.5. As the grievor had previously accumulated fifty-five active demerits, the addition of the fifteen demerits discharged him for accumulation of demerit marks in excess of sixty.

The Union contends that the grievor was not responsible for the violation of CRO Rule 104.5, but rather the Locomotive Engineer who failed to take the proper action to stop the train.

The Company disagrees with the Union's contentions.

DISPUTE (4654):

Appeal on behalf of Conductor F.A., concerning the assessment of discharge for "Violation of Rule G and the Company Policy to Prevent Workplace Alcohol and Drug Problems during your tour of duty as Brakeman on Assignment L55551-15 on November 15, 2017, and testing positive in post incident testing for illegal drugs (cocaine)".

THE COMPANY'S EXPARTE STATEMENT OF ISSUE (4654):

On November 15, 2017 the grievor was called as the Brakeman on L55551-15 assignment in Red Deer, Alberta. During this assignment the grievor's movement went over a derail, derailing NCLX 3254.

The grievor was required to undergo Drug and Alcohol testing for which the results were non-negative. Further laboratory tests resulted in the grievor being positive for cocaine on the urine and oral fluids tests. After an investigation on November 28, 2017, the Company discharged the grievor for a violation of Rule G and the Company Policy to Prevent Workplace Alcohol and Drug Problems.

The Union contends that the Company has discriminated against the grievor because the grievor has a characteristic that is protected by the *Canadian Human Rights Act*, and he should be reinstated into his employment, without loss of seniority or loss of wages. The Union further contends that the Company failed to follow their own policy on post incident testing and the Canadian Human Rights Commission Policy on Alcohol Testing, indicating that one set of wheels being derailed at a derail could not be classified as a significant accident or incident.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) P. Payne (for) **K. Madigan**
VP Human Resources

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
K. Morris	– Senior Manager, Labour Relations, Edmonton
Dr. L. Garand	– Chief Medical Officer, Montreal
K. Smolynec	– Senior Manager, OHS, Montreal

There appeared on behalf of the Union:

M. A. Church	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chair, Saskatoon
D. Kovacs	– Vice General Chair, Vancouver
M. Anderson	– Vice General Chair, Edmonton
F. A.	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

The above grievances, although both related to the same incident, were presented - and will be addressed - separately. It being nevertheless clear that if the Union's argument relative to the Employer's duty to accommodate is successful, that result would apply with respect to both grievances.

The Grievor began his work with the Company in 2011. Within his six years of service - and prior to the incident at issue here - the Grievor accumulated a total of 75 demerits, 55 active demerits, 2 Suspensions (45 days and 15 days) and 3 Written

Reprimands *(Company Ex. 6).* The disciplines imposed in the circumstances here complete the total of eleven discipline interventions over his six year career. Of note in this regard is the fact that on July 22, 2016 (*Company Ex. 7*), when his demerits total was 55, the Grievor's disciplinary record was reviewed with him to ensure that he fully understood the gravity of his situation. As that letter states:

> *During the interview, I explained the Company's expected performance standards. Additionally, I explained the availability of EFAP, if required".*

Following that meeting, on January 19, 2017 the Grievor was assessed a Written Reprimand, instead of demerits, for Attendance Management providing him with a final opportunity to change his behavior.

Assessment of 15 demerits (Case No. 4653)

The facts are not in dispute. On November 15, 2017, the Grievor worked as an Assistant Conductor ('brakeman') on assignment L55551-15 in Red Deer, Alberta when he was involved in a Rule 104.5 violation causing a derailment.

The Grievor and his crew were required to deliver cars to track QQ98 in the Red Deer CP interchange. During the move, the Grievor - protecting the point - walked ahead of the first piece of equipment, car no. NCLX 3254, controlling the movement by radio. It was dark. The Grievor was using his switching lantern for illumination. The Conductor and Engineer advised him, via the radio, of both the position and colour of the switch he would encounter and the location of the derail. The entire incident was witnessed - and the radio contacts overheard - by Supervisor Mitchell who confirmed

the facts in a memorandum dated November 20, 2107 (*Company Ex. 5*). According to Mitchell, when entering track QQ98, the Grievor told the Locomotive Engineer (LE) to shove the movement six car lengths - approximately 300 ft. Although the derail was marked with a sign, the Grievor did not immediately notice it. After travelling 2/3 car lengths, the Grievor spotted the derail and

> *"... requested an emergency brake application from the engineer. The movement failed to stop in time and ended up derailing 1 axle on the leading car... Number NCLX 3254."*

CROR 104.5 requires that:

> *104.5 DERAILS*
> *(a) The location of each derail will be marked by a sign, unless otherwise directed by special instructions. Employees must be familiar with the location of each derail.*
>
> *(b) A movement or track unit must stop short of a derail set in the derailing position. A movement or track unit approaching a derail set in the derailing position must stop at least 25 feet before the derail and place derail in the non-derailing position before further movement is made*

Following the incident, the Grievor was removed from service and served with a Notice to Appear to provide a formal employee statement. On November 28, 2017 the Grievor provided a formal employee statement in connection with the derailment *(Company Ex. 3)*.

At the conclusion of the ensuing investigation, the Company determined the Grievor was deserving of discipline for his non-compliance with CRO Rule 104.5 and was assessed 15 demerits. This resulted in the Grievor accumulating 70 active demerits and therefore subject to termination. He was discharged on November 30, 2017.

The Company argues that the imposition of the 15 demerits is justified having regard to: the seriousness of the breach of rules; the Grievor's short service; his disciplinary history; his attempt to lay the blame for the ultimate derailment on the LE for failing to implement the emergency stop procedure; and, arbitral jurisprudence which supports the assessment of 15 demerits in the circumstances.

The Union argues that: responsibility should ultimately fall to the LE who failed to implement the emergency braking procedure; the discipline assessed to the Grievor was discriminatory in that neither the Conductor or LE were assessed any discipline for the incident; and, the discipline was unwarranted and excessive in the circumstances.

Having reviewed the evidence, I conclude that the Grievor was responsible for the derailment. He was obligated to protect the point. Instructions, as overheard by the Supervisor, were clearly provided to him by the Conductor and LE. Nevertheless, because of his negligent inattention, he failed to see the appropriate signs until it was too late (a fact he acknowledged). In all events, he was responsible to ensure that the movement stopped at least 25 feet short of the derail (CRO Rule 104.5). In the circumstances I am unable to conclude that responsibility or discipline ought to have been ascribed to the Conductor or LE.

Given the circumstances, including: the Grievor's safety sensitive position; his abysmal record; his short service; and, the jurisprudence provided, I conclude that 15 demerits for the Grievor's ultimate responsibility for the incident is warranted and

justified.

Absent a positive finding on the Union's argument regarding the application of the *Human Rights Act* as discussed in **CROA 4654** (below), I would uphold the 15 demerits discipline and the Grievor's consequent termination due his accumulation of 70 demerits.

Violation of Rule G (Case No. 4654)

As outlined in the Ex Parte Statement of facts, following the derailment described above, the Grievor was required to undergo Drug and Alcohol testing which resulted in his testing positive for cocaine on both the urine and oral fluids tests. After an investigation on November 28, 2017, the Company discharged the Grievor for a violation of Rule G and the Company Policy to Prevent Workplace Alcohol and Drug Problems.

As referred to in its Brief in **CROA 4653**, the Union takes the position that:

> "*For the reasons that follow both in this and the related dispute regarding dismissal for Rule G breach, it is the Union's overarching contention ... that, in view of the Grievor's medical disability, his post-incident efforts at recovery and the Company's statutory duty to accommodate in relation to such, the Grievor should be extended a further chance to continue his career on terms designed to protect the parties' interests.*

At the conclusion of his formal statement in **CROA 4653**, the Grievor admitted to a substance abuse problem. He volunteered the following (*Company Ex. 2)*:

> *21.Q. Do you have anything to add to this employee statement?*
> *A: I would like to admit that I have an issue and I would like to seek counseling. I have a drug problem and I have been seeking*

counseling and contacted EFAP. If the locomotive engineer Fecho would have put it in emergency and not stopped with only the independent we would have not had this derailment."

In his interview on November 28, 2017 regarding the present matter *(Company Ex. 3*), the Grievor stated the following:

10.Q.: F.A., where you under the influence of cocaine while you were on duty for the 5551 15 on November 15, 2017?
A. Yes.

11.Q.: F.A., prior to the Driver's Check testing, when was the last time you used cocaine?
A. 10 or 14 hours prior.

12.Q.: F.A., the last time you used cocaine in reference to Q&A 11, how much did you use?
A. Three lines, about half a gram.

…

17.Q.: F.A., referring to your answers that you understand you are required to be fit for duty, obey the rules which are of the first importance in the performance of duty and understand the CN Drug and Alcohol Policy, can you explain why these instructions were not complied with, when your Driver's Check came back with a positive result of Cocaine use?
A. I was going through a lot of stuff in my life which did not allow me to make the right judgements. That period of time was very stressful and I was working lots. As a result, I did not comply with the rules.

18.Q.: F.A., did you seek any help prior to the incident?
A. No, I did not.

19.Q.: F.A. Do you have any questions pertaining to the matter under investigation which you wish to ask for the record through the Presiding Officer?
A. Yes

Questions for F.A. from the Union.

Q1. F.A., at what age did you hire on with CN Rail?
A. 18 years of age.

Q2. F.A., so this has been your only form of employment in your adult life. Is that correct?
A. Yes.

Q3. F.A., can you explain the importance of this job to you?
A. I feel that this job runs in my family which allowed me to develop further in my life and with the responsibilities from working as a conductor to a locomotive engineer.

Q4. F.A. were you undergoing any stressful life events leading up to this incident at CN and can you please explain?
A. Absolutely, I went through life altering events that I will never forget. **(He described these issues in his statement. While I have taken them into consideration, I have left them out of the narrative for privacy purposes)** *I do have a drug problem and I understand the severity of that. The love of my life has impacted drastically, which led me to fail Rule G and any obligations to CN. Living alone has been stressful and not being able to talk to my father. …*

Q5. F.A., with all these stressful life events leading up to this incident, where you not mentally able to seek help for your drug problem?
A. I was working so much and concentrating on other matters and I failed to take the safest route, which caused me to not seek help and remain fit for duty.

Q6. F.A., have you contacted EFAP?
A. I did so, yes. I have an appointment scheduled for 13:00 this Thursday.

Q7. F.A., when did you last use cocaine before beginning your shift on train 555 on November 15, 2017?
A. About three hours prior to my call for service.

Q8. F.A., do you believe you were in denial about your drug use, prior to this incident?
A. Yes, I was
…
20.Q. F.A., how long have you been using "cocaine" before November 15, 2017?
A. Its very rare that I use cocaine but doing it once could be your last.

The Grievor concludes his statement with the following:

I know this Rule G showed the worst in me. But these life altering events that occurred has impacted me drastically. Staying on the work matter, I understand I was in violation of the Drug and Alcohol Policy, I would like to state that the circumstances that I have overcome and am going through clouded my judgement. I feel I developed a great amount of knowledge in this incident and I am willing to do whatever it takes to get my job back. I feel I can be an asset to this company and I always do my utter most to the rules, follow up and train myself and everyone around me. Safety in doing

> *this work, was always the first importance while I was on duty. I apologize for not complying with the Rule that has been set to save lives. If given another chance, CN will know that I am willing to change for the better and I will put the past behind me and I will obey by the rules and obligations this company has set forth for safe operations and travel of these movements. (**Union Ex. 3**, Q&A 21)*

Decision

There is no dispute that the Grievor worked in a safety sensitive position and that he ingested cocaine prior to reporting for work contrary to Rule G. Nor can it be disputed that, because of his negligent inattention, he did not see the appropriate signs regarding the derail until it was too late. He miscalculated the number of cars which could safely be moved onto the track and he failed to see the problem until it was too late to remedy it. Instead, as indicated above, he attempted to pass off responsibility to the LE for failing to respond quickly enough to his call for an emergency stop.

The Union contends that the Company, in requiring the Grievor to submit to a drug and alcohol test pursuant to Rule G, failed to follow its own policy on post incident testing in that one set of wheels being derailed cannot be classified as a significant accident or incident. I disagree and adopt the reasoning of Arbitrator Picher in this regard where he states **(CROA 3818)**:

> *How is this Office to approach the case at hand? Firstly, I have some difficulty with the suggestion of the Union that the Company did not have grounds to request the drug and alcohol test as it did. It is well established that the consumption of certain drugs, including cocaine, does not, unlike the consumption of alcohol, create a set of physically obvious and identifiable symptoms or manifestations of drug consumption. Secondly, in the case at hand, in the supervisor's judgement the accident which occurred was uncharacteristic and unexplained. The Company's policy contains the following passage with respect to post-accident or incident testing:*
>
> > *Reasonable Cause and Post Accident Testing*
> > *Biological testing for the presence of drugs in urine or alcohol in*

> *breath is conducted where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post-accident testing* ***is done after any significant accident or incident*** *where an experienced operating officer, upon consideration of the circumstances determines that the cause may involve or* ***is likely to involve a rule violation and/or employee judgement****, in cases of reasonable cause or post-accident testing, any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered to be in violation of this policy.*

> *In the Arbitrator's view the foregoing statement properly reflects the appropriate approach to the balancing of interests which is inherent in the drug and alcohol testing of safety sensitive employees. That was confirmed in SHP 530, an award which extensively reviewed the Company's drug and alcohol testing policy. ...(emphasis added)*

As set out in **CROA 4653**, I conclude that the derailment in this case amounted to a significant incident which justified the Supervisor who observed the entire event - on consideration of all the circumstances - in concluding that the incident involved a rule violation or employee judgement in a safety sensitive position.

When the Grievor met with the Company on July 22, 2016 (Company Ex. 11), his performance was canvassed and he was specifically offered the availability of EFAP. He did not raise any issues related to his alleged use of cocaine either habitually or otherwise.

Furthermore, in his post incident statements, he attempted to hide his drug use by stating that "*he has been sick with the flu, and is concerned acct. his roommate smoked marijuana"* (Q. 8).

The first time he raised the issue of a drug problem was in his volunteered

response at the conclusion of his Rule 104 formal investigatory statement - six days after the incident (Q. 21) - wherein he states: "*I would like to admit that I have an issue and I would like to seek counseling. I have a drug problem... .* In the present investigation statement on November 28, 2017, when asked how long he had been using cocaine before the incident, he stated: *It's very rare that I use cocaine but doing it once could be your last."*

The only remaining issue is whether the Grievor – when the incident occurred - had a substance abuse problem that can be considered a disability under the *Charter of Rights*; and, if so was the infraction committed linked to the alleged disability? As stated in *Collective Agreement Arbitration in Canada; 4th Ed.; Snyder; at page 378:*

> *"Absent addiction, there may be no requirement to accommodate. In order to rely on the human rights protections afforded to people with substance dependencies, the employee must establish the disability or handicap. This may require medical or expert evidence when the question of "handicap" is put in issue. Absent such proof, or where the employee denies any addiction, the issue is not one of discrimination because of an actual or perceived handicap or disability, but rather whether the employer had just cause to terminate or discipline the employee. ..."*

In **CROA 4527** Arbitrator Flynn: dealt with a case where a Conductor was similarly terminated following a post-accident Drug and Alcohol test which revealed impairment from marijuana. I am persuaded by both her logic and the results arrived at therein. She observes as follows:

> *The burden of proof rests on the Union's shoulders. It must demonstrate, on the balance of probabilities, that the Grievor had indeed a disability and that there is a connexion (sic) – or causal link – between the disability and the violation that incurred discipline*
> ...
> *The Employer asserts that in order to establish the existence of a disability, expert medical evidence has to be submitted by the Union.*

> *While it is true that a physician's diagnosis weighs heavily in the appreciation of a grievor's condition, some nuances must be made.*
>
> *A review of the jurisprudence shows that arbitrators do not always require expert medical evidence to conclude that a disability does afflict a grievor. However, if no such expert opinion is presented, other medical evidence must make the case for a disability quite compelling.*
>
> *…*
> *In another decision, Toronto (City) v. CUPE, Local 79, arbitrator Goodfellow writes that:*
>
> > *... What does appear clear, however, is that there is a distinct arbitral preference for medical evidence that, if not addressing the question directly, at least provides something beyond the basic diagnosis from which that connection can reasonably be drawn. Without such evidence, in my opinion, the Union runs the substantial risk of a finding that the onus has not been met -- a risk that increases, not decreases, with the scope and extent of the behaviour that is in issue."*
>
> *...*
>
> *In AH 638, arbitrator Schmidt wrote that:*
> > *"In order for this grievance to succeed, the Union must establish on the face of the undisputed facts, that the grievor was not culpable for his conduct because of his disability or that the penalty of discharge is too severe, taking into account any mitigating circumstances. The Union accepts that arbitrators require that the medical evidence proffered must substantiate a link between the misconduct at issue and the medical condition."*
>
> *Concerning the present case, there is simply not enough evidence to allow the conclusion that Mr. Cook was indeed suffering from a disability at the time of the incident. While the assessment of a disability does not always require expert medical evidence, it requires more than what was adduced before this Court.*

The Union presented evidence that showed that the Grievor went to great lengths, post incident, to obtain counseling and treatment and support for his drug use (Union Exs. 9 - 19). It is apparent that, following his dismissal, the Grievor clearly appreciated the value of his job and went above and beyond to illustrate to the Company both that he was drug free and his obvious desire to be re-instated to his

previous position. However, as Arbitrator Flynn observed:

> *It is not enough to simply claim that one may have substance abuse or is facing challenges with substance abuse and that one visited the EAP a few times. As arbitrator H. Kates explained in* ***CROA&DR 1341****:*
>
> > *"[…] in order for an employee to take proper advantage of the Company's EAP Program, that employee must come forward and voluntarily submit to it prior to any incident that may give rise to a legitimate disciplinary response on the employer's part. The EAP Program is not designed to be used as a "shield" for a breach of Rule 'G' after the fact. At that time the threat to the safety of the company's railway operations has occurred and such risks should not be seen to be condoned by a belated recourse to the Company's EAP Program."[Emphasis added]*

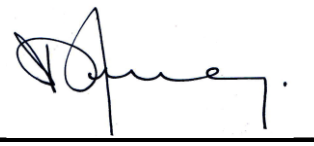
Union Document 16, consists of a note from a doctor (who the Grievor was seeing for the first time on August 12, 2018) essentially repeating what the Grievor told him relative to his cocaine "problem". However, that letter simply does not meet the evidentiary threshold to establish *a* link between the misconduct at issue and the medical condition. The evidence is that, at the time of the incident, the Grievor was an occasional user of cocaine. In the result, there is no evidence upon which I can conclude that the Grievor was indeed suffering from a disability at the **time of the incident**. While, I accept that the assessment of a disability does not always require expert medical evidence, it requires more than that adduced at this hearing.

The Union urges that I take into consideration the laudable counseling and support the Grievor sought, post incident, to rehabilitate himself and his image in order to prove his suitability to be re-instated by the Company. It urges me to exercise my discretion and re-instate him on terms I consider acceptable.

With regret, I am unable to do that in the circumstances here. The Grievor's record and his length of service do little to support finding mitigating circumstances that would encourage me to exercise my discretion. Furthermore, his abysmal record reflects that progressive discipline simply has not worked for the Grievor.

Even leaving aside the fact that the imposition of 15 demerits for the breach of Rule 104 put him over the top and subject to dismissal, his coming to work under the influence of cocaine represents a serious offense deserving of severe discipline. In both instances, herein, I conclude that discipline was warranted and the discipline imposed was reasonable in the circumstances.

The grievance is dismissed.



December 6, 2018

RICHARD I. HORNUNG, Q.C.
ARBITRATOR