

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4690

Heard in Edmonton, June 12, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

The dismissal of Mr. D. Kruk.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The issue in this case involves bargaining unit employee D. Kruk being dismissed from Company service for Violation of Rule Book for Engineering Employees Section 7 – Protecting track units and track work on Main and other signalled tracks. A grievance was filed.

The Union contends that; Mr. Kruk did not receive a fair, impartial or complete investigation; Mr. Kruk's dismissal was excessive and in violation of Articles 15.1 and 15.2 of the Collective Agreement.

Mr. Kruk was wrongfully dismissed for a violation of Company cannot verify and for which there is a great deal of uncertainty as to whether Mr. Kruk was in violation of any rule.

Mr. Kruk is a 29-year employee who was dismissed over an alleged violation using the Company's new EIC TOP system that has flaws and is only in its infancy and which has had several technical flaws in its development.

The Union requests that the Company be ordered to reinstate Mr. Kruk into Company service without the loss of seniority and with full compensation.

The Company denies the Union's contentions and declines the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The issue giving rise to this dispute involves bargaining unit employee David Kruk being dismissed from company service on December 10, 2018 after a fair and impartial investigation was conducted on December 4, 2018.

The grievor was dismissed for the following reason(s): Please be advised that you have been dismissed from Company service effective December 11, 2018. This is in connection with your rules violation for being outside of your limits on November 21, 2018.

You are assessed this discipline for the following reason(s): Violation of Rule Book for Engineering Employees Section 7 – Protecting Track Units and Track Work on main and other signaled tracks.

Company's Position: The grievor failed to establish a proper Track Occupancy Permit during his tour of duty on November 21, 2018.

The investigation was conducted in a fair and impartial manner and no violation of Article 15.1 and 15.2 of the Collective Agreement occurred.

The grievor violated his Last Chance Agreement dated December 7, 2016 by failing to have the appropriate track protection.

It is the position of the Company that the EIC system functioned as intended on November 21, 2018.

The Arbitrator has no jurisdiction to substitute a lesser penalty.

The Company requests that the grievance be dismissed.

FOR THE UNION:
(SGD.) G. Doherty
President

FOR THE COMPANY:
(SGD.) W. McMillan
Labour Relations Manager

There appeared on behalf of the Company:

W. McMillan	– Manager, Labour Relations, Calgary
D. McGrath	– Manager, Labour Relations, Calgary
B. Rota	– Specialist Track Renewal, Calgary
P. Sztanko	– Director PTC and Train Control, Calgary
D. E. Guerin	– Senior Director, Labour Relations, Calgary

There appeared on behalf of the Union:

H. Helfenbein	– Vice President, Medicine Hat
D. Brown	– Counsel, Ottawa
D. Kruk	– Grievor, Sudbury

AWARD OF THE ARBITRATOR

Following a full hearing, the parties arrived at a negotiated resolution of this case pursuant to the Conditional Last Chance Agreement below. Accordingly, the terms and conditions as set forth below represent a consent award and my final determination in this matter.

Conditional Last Chance Agreement

The Company is now willing to offer Mr. Kruk conditional re-employment subject to the terms outlined herein. Should Mr. Kruk wish to resume his employment with the Company, he will be required to comply with the following:

Before return to active service takes effect Mr. Kruk must:

1. Contact Health Services (1-866-876-0879 and select option 3) within two (2) weeks of the Arbitrator's final award to commence his fitness to work assessment. If Mr. Kruk fails to comply with these time limits, it will be considered a violation of this agreement, and Mr. Kruk will remain dismissed.

2. Submit to a Health Services directed safety sensitive medical assessment, and any other medical assessment deemed necessary under the terms and conditions directed by the Health Services Department (HS), in compliance with the Fitness to Work Medical Policy & Procedure. Mr. Kruk must pass his first (1) return to work substance test (negative). If he does not pass the return to work substance test, this agreement will be considered to have been violated and Mr. Kruk will remain dismissed from Company Service. The CP Program Administrator will advise Labour Relations of the test results.

3. Before returning to service, Mr. Kruk must be determined to be medically fit (Safety Sensitive) to do so by the office of the Chief Medical Officer or his designate.

4. Further to the medical assessments referenced above, Health Services will determine whether there are any further medical requirements with which Mr. Kruk must comply.

Once the terms and conditions above have been complied with, subject to the terms and conditions below, arrangements will be made for the return to service of Mr. Kruk. The employment of Mr. Kruk will be subject to the following additional terms and conditions:

5. Mr. Kruk will receive \$8,097.60 in compensation for his time out of service. The Company will also pay the pension contributions of Mr. Kruk for his time out of service.

6. Mr. Kruk will be restricted from taking any track protection for a minimum period of two (2) years. This two (2) year period will commence upon the return to active service of Mr. Kruk and will be extended by an amount equal to any period in which Mr. Kruk is not in active service with the Company. At the expiry of this two (2) year period the VP of Engineering will review the restriction of Mr. Kruk and will make the final determination as to whether the restriction will remain in place.

7. The Company and the Union have agreed after a consultation process that after Mr. Kruk has successfully completed the return to work process noted in this agreement that he will work in the capacity of a TM/TD (TM/TD A rate of pay). Mr. Kruk must displace to a vacant TM/TD position on his Seniority Territory and will be afforded expenses as per Section 12 of the Collective Agreement if he is required to work beyond eighty (80) Kms. from his home.

8. If there are no vacant TM/TD positions on Mr. Kruk's Seniority Territory that he can displace to, Mr. Kruk can work a vacant TM position and his pay will not be reduced and the expense provisions stated above, will be applicable. It is agreed that Mr. Kruk will be able to bid on subsequent bulletins to secure a TM/TD position by bid award and if he is successful, and the bid award position is closer than eighty (80) Kms. from his residence, the expense provisions will no longer apply. It is understood and agreed between the parties that if a TM/TD or TM position becomes vacant closer to Mr. Kruk's primary place of residence Mr. Kruk will be required to bid on that position in order to lessen the liability to the Company and for Mr. Kruk to work closer to his primary residence.

9. Before recommencing active duty, Mr. Kruk will be required to successfully complete any necessary training and / or rules re-qualification. Mr. Kruk will only be entitled to compensation and /or expenses associated with his attendance at such training and/or rules re-qualification if he successfully passes all re-qualification examinations.

10. Prior to any return to active service Mr. Kruk will be required to successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the return to work of Mr. Kruk and to provide full understanding and clarity regarding these expectations. If he desires, an accredited representative may accompany Mr. Kruk to this interview.

11. Mr. Kruk's discipline record will reflect his subsequent reinstatement from dismissal for his TOP violation on November 21, 2018. This agreement acts as a full and final resolve for grievance file number 13-1806 that was issued by the Union.

12. Any violations outlined in the CP disciplinary process and/or the Engineering Safety Rule Book, SPC 41 or failure to comply with any of the terms of this Agreement during the two (2) year period of this agreement outlined herein will result in Mr. Kruk's removal from service and an investigation.

13. If, following a fair and impartial investigation, the Company determines that Mr. Kruk 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. Kruk;

b. The Company, in its sole discretion, may elect to dismiss Mr. Kruk 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. Kruk violated or failed to comply with the terms and conditions of this Agreement; and

d. It is agreed that the Arbitrator, in respect of any such grievance, shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that Mr. Kruk violated or failed to comply with any of the terms and conditions of this Agreement.

14. There shall be no grievance advanced in respect of this Agreement.

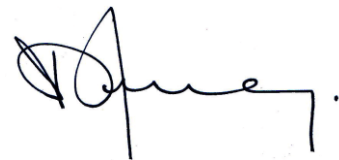
15. This Agreement is without precedent as to positions that may be taken by the Company or the Union in similar circumstances involving other employees and is not to be used in any way in future grievances or arbitrations or as a precedent in cases involving other employees. It is expressly understood that this Agreement is based upon the unique facts of this case.

16. This agreement will be in effect for a period of not less than two (2) years. This two year period will commence upon the return to active service of Mr. Kruk and will be extended by an amount equal to any period in which Mr. Kruk is not in active service with the Company.

17. This Agreement will remain on the employment record of Mr. Kruk and may be utilized in the event that he appears before an arbitrator regarding this Agreement or any other future proceeding.

If Mr. Kruk wishes to continue his employment with the Company he must comply with the terms and conditions above.

August 19, 2019

A handwritten signature in black ink, appearing to read "R. Hornung", written over a solid horizontal line.

RICHARD I. HORNUNG, Q.C.
ARBITRATOR