CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4700

Heard in Edmonton, September 17, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced the appeal of the dismissal of Locomotive Engineer J. Yampolsky of Coquitlam, BC.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Yampolsky was dismissed for the following reasons:

For reporting for duty and working as a locomotive engineer while under the influence of intoxicants as evidenced by your positive Post Accident/Incident substance tests that were conducted following a rules violation in Coquitlam yard on January 26, 2018; a violation of Rule Book for Train and Engine employees, section 2-item 2.1(a) (i), Rule Book for Train and Engine employees section 2.2 (d(i)(ii)(iii), CP Rule Book for Train and Engine employees Section 2, item 2.2 (c(v)), CP Rule Book for Train and Engine employees Section 2, item 2.2(c(vii).

Union's Position:

The Union contends that given the evidence in this case, the Company has not met the burden of proof to establish that Engineer Yampolsky was under the influence of intoxicants. He freely admitted that he used cocaine roughly 24 hours prior to the testing. Cocaine saliva testing can detect cocaine for between 12 and 48 hours after use, which is in keeping with his evidence. The Union also points out that effects of cocaine wear off long before 24 hours.

The Union contends that it is obvious the actions of Engineer Yampolsky on January 26, 2018 are uncharacteristic of an employee with nine years of dedicated service. However, his actions are common among people who are struggling with life issues and addiction.

Engineer Yampolsky has acknowledged and taken responsibility for his illness, he is continuing to take all the right steps towards recovery. The Union must remind the Company that the *Canadian Human Rights Act* defines dependence on drugs or alcohol (substance dependence) as a disability. Mr. Yampolsky has recognized that he has an illness after this incident.

The evidence submitted by the Company indicated Engineer Yampolsky was deemed FIT for non-safety sensitive duties pending a Health Services Fitness to Work Medical Assessment. His restrictions allowed him to work in another capacity. The Union contends the Company could

have and still can accommodate Mr. Yampolsky while he continues to become healthy enough to obtain a full medical clearance to return to work as a Locomotive Engineer.

Engineer Yampolsky has close to a decade of service with Canadian Pacific and has up until this point maintained a respectable working record. The Union contends he is not deserving of the inequitable treatment as evidenced in this case.

It is the Union's contention that the discipline imposed was excessive, unjustified and unwarranted. The Union further contends that giving up on Engineer Yampolsky because of an addiction/disability is a violation of the *Canadian Human Rights Act* and jurisprudence in these cases.

For the reasons stated, the Union requests that Engineer Yampolsky be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

On January 26, 2018, the Grievor was post-incident substance tested as a result of running through the C1/A lead switch on the VIF-B in Coquitlam Yard. At approximately 0804 on January 26, 2018 – approximately three and a half hours after the commencement of the Grievor's shift – the Grievor's post-incident substance test revealed that the Grievor had tested non-negative. The Grievor's post incident substance test confirmed the following: negative breath alcohol; positive oral fluid drug test; and positive urine drug test.

On February 13, 2018, two investigations with the Grievor were held. The first investigation was held regarding a run through switch on January 26, 2018. The second investigation was held regarding the Grievor's post-incident substance test results. During the second investigation, the Grievor confirmed that his positive post- substance test results were the result of having taken cocaine approximately 28 hours prior to the test.

The Company maintains that through the fair and impartial investigation, culpability was established. It is the Company's position that the Grievor's positive post-incident substance test results revealed that the Grievor was impaired at the time of duty on January 26, 2018, which warranted his dismissal. The Grievor failed to report his alleged illness prior to the incident.

Furthermore, any related medical documentation to substantiate the Grievor's alleged medical illness has not been provided to date. Therefore, it remains the Company's position that the Grievor cannot be afforded any legal protections as detailed in prior arbitral jurisprudence.

The Company maintains that the Grievor was properly dismissed for these actions, and accordingly denied this grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Edwards	**(SGD.) A. Jansen**
General Chairman	Labour Relations Officer

There appeared on behalf of the Company:

A. Jansen	– Labour Relations, Manager, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary
W. McMillan	– Labour Relations, Manager, Calgary
Dr. I. Greenwald	– Medical Expert Witness, Toronto

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto

G. Edwards	– General Chairperson, Calgary
H. Makoski	– Senior Vice General Chairperson, Calgary
J. Harris	– Vice General Chairperson, Coquitlam
Dr. Farnan	– Medical Expert Witness, Vancouver
J. Yampolsky	– Grievor, Coquitlam

AWARD OF THE ARBITRATOR

Preliminary Objection

At the commencement of the hearing, the Company objected to the Union's intended introduction of an Independent Medical Examination ("IME") by Doctor Paul Farnan (Union Exhibits; Tab 12) and any testimony of Doctor Farnan that might relate thereto. The report deals with Doctor Farnan's opinions relative to the Grievor's substance addiction to cocaine.

The IME was provided to the Company on March 29, 2019; the Company raised its objection on September 6, 2019. The Company objects to all evidence within the IME that was not properly advanced during the investigative process before a disciplinary decision was arrived at. It argues that significant facts relied on by Dr. Farnan in his report were facts that, if true, the Union was obligated to bring forward during the investigative process as per Article 39 of the Collective Bargaining Agreement.

The issue of the admissibility of an expert's report, subsequent to the conclusion of an investigation, was recently dealt with by Arbitrator Weatherill in **CROA 4695**. In that case, the company attempted to introduce an expert's report 7 days prior to a long delayed hearing date. Language similar to Article 39.02 of the Collective Agreement applied. The arbitrator concluded:

> *"The grievor was discharged on August 31, 2017, within the 20-day period following the investigation, and thus within the period contemplated by Article 70.04. The investigation, clearly, had been "completed" on August 31. … The "record", so to speak, was closed at that time. … The collective agreement expressly requires that employees not be disciplined until an investigation is held and the evidence, which the employee and the union may of course examine and question, has been produced. That has not happened in the instant case with respect to the expert report.*
> *…*
>
> *… For the reasons set out above, however, I am persuaded that it would be unfair to the grievor and the Union to allow the introduction of such evidence at this late stage of these extended proceedings, or to overlook the representation made by the Company. Further, it is my view, for the reasons set out above, that to allow the introduction of the evidence would be to modify or disregard the provisions of the collective agreement."*

The Union asserts that there is no reciprocal obligation in Article 39 which compels it – nor is practical - to disclose expert's reports at the investigation stage. Rather, the mandatory language of Article 39 (39.01(4); 39.02; and 39.04) puts the burden of full disclosure solely on the Company.

While I agree with Arbitrator Weatherill, in the present case the distinguishing circumstances is that the impugned expert report is being proffered by the Union rather than the Company and had been provided to the Company well in advance. That said, Although unnecessary here because of my ultimate decision on the objection, it remains to be considered whether there is an obligation for the Union – at a minimum – to raise the alleged fact of the Grievor's addiction prior to the conclusion of the investigation.

The overriding issue is whether or not the Grievor has an addiction which compels the Company to accommodate him. Having regard to the Union's burden of proving a *prima facie* case of discrimination on a protected *Human Right*, the introduction of the expert's report is relevant and admissible on whether or not the evidence serves to:

> *"... shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented" (*Quebec Cartier; Infra*)*

Accordingly, given that each party has its respective burden, the evidence of Dr. Farnan will be admitted; as will the evidence of the Company's expert witness, Dr. Iris Greenwald (Employer Exhibits; Tab 11), filed in response. The question remains, what weight, if any, is to be given to either.

Background

The Grievor began work with the Company on September 9, 2008. In March 2015, he qualified as a Locomotive Engineer.

On January 26, 2018, while operating a locomotive at the Vancouver Intermodal Facility, he ran through a switch and caused a derailment.

As a consequence, he underwent a post-incident substance test. He was advised by the testing facility that the test results were "*non-negative*", indicating that further lab-based analysis would be conducted on his specimens. A subsequent lab test of the same urine sample confirmed a positive result for cocaine (Union Exhibit; Tab 13).

In the investigation which followed (Union Exhibit; Tab 11), the Grievor admitted to having ingested cocaine (Q.19) but said that he did so 28 hours prior to being tested (Q. 20). In addition, the following exchange took place:

Question 25: *At 0:4:30 on January 26 were you still feeling the effects of the cocaine you consumed on January 25?*

Answer: *Absolutely not.* ***I would not have come to work had I felt I was under the influence.***

Question 26: *How long did the cocaine consumed on January 25 have an effect on you?*

Answer: *No more than a couple of hours because I went to bed not long after.*

Question 27: *Do you think the consumption of this narcotic played a role in your incident on January 26, 2018?*

Answer: *No. I feel this is a momentary lapse in judgment as to the indication of the switch*

Question 29: *Do you need the company's help contacting EFAP?*

Answer: *No. I have already been in contact and have been dealing EFAP since this incident occurred.*

Question 39: *Do you have anything further you wish to add in this investigation?*

Answer: *Yes. I realize the severity of the situation and the position that I am in. I want to make it very clear that* ***I was not under the influence of any substance whatsoever while I was at work on that day. Nor have I ever been in my 9 and ½ years of employment.*** *Moving forward, I have taken steps and put measures into place specifically through the company EFAP plan to address my behaviour and any problems that exist.*

As his record reflects, prior to this incident, the Grievor tested positive for cocaine. As reflected in the Union's submissions (para. 34):

> *"He subsequently attended a Company arranged IME with one Doctor Sobey on January 9, 2012. Doctor Sobey was unable to conclusively determine that Mr. Yampolsky met any of the criteria for substance abuse. Mr. Yampolsky returned to work without discipline and did not test positive again until the incident which led to the dismissal before this office."*

In an effort to advance the Grievor's *prima facie* case that a duty to accommodate existed, the Union proffered the report and *viva voce* evidence of Dr. Paul Farnan. In the report, specific questions were posed to Dr. Farnan. The relevant portions are as follows:

> *1. In your professional opinion, did Mr. Yampolsky have an addiction to cocaine at the time of his January 26, 2018 assignment?*
>
> *Answer: Based on the information available,* ***which is primarily history self reported by Mr. Yampolsky,*** *it would appear that he was actively addicted to cocaine (as well as alcohol) at the time of his January 26, 2018 assignment.*
>
> Please explain the basis for your opinion
>
> Answer: **This diagnostic opinion is based on the history provided by Mr. Yampolsky** of ongoing substance use despite negative consequences, poor control over use, cravings etc. for cocaine and alcohol.
>
> *2.* In your professional opinion, does cocaine addiction impact an individual's ability to control his ability to use cocaine at a given time, including when he may be on or subject to duty? Does cocaine addiction impact an employee's ability to refrain from using cocaine that may be inappropriate or unsafe to do *so?*
>
> *Answer: ...*
> *...* ***simply having a diagnosis of addiction does not mean that the individual becomes an automaton and is totally unable to control his or her use of substances****. Usually employees try to avoid alcohol or drug use when it might be associated with unsafe outcomes at the*

> *work place and indeed* ***Mr. Yampolsky is stating that he did not use alcohol or cocaine at work or close to scheduled shifts...***
> *(emphasis added throughout)*

Dr. Farnan did not assess the Grievor's condition until March 4, 2019.

I accept the evidence of Dr. Farnan. However, fairly put, his report, and the conclusions he reached therein, are based on the information provided to him by the Grievor. In fact, throughout his report, Doctor Farnan is careful to state that his conclusions are based on the history provided by the Grievor. For example, at page 5, he states:

> *"There appears to be little doubt that Mr. Yampolsky has met the diagnostic criteria for addiction over the past 6 years or so,* ***based on the history he provided****..."*

Oddly, this observation follows a statement, on page 3, reporting that:

> *"In the past, Mr. Yampolsky did have an evaluation by an addiction medicine expert in January 2012.* ***He stated that he was not honest with the evaluator at the time and as a result he was not diagnosed as having a substance use disorder diagnosis in 2012****. Even though post-incident testing 2012 had resulted once again in a confirmed positive urine drug test for the presence of cocaine."*

And, at page 7 he notes that his conclusion depends on:

> "*… if Mr. Yampolsky is being honest…he never use [sic] drugs at or before work shifts*"

These references to the Grievor's honesty (or lack thereof as will be discussed) is compounded by his lack of candour in his statements to the investigating officer. He stated that he ingested cocaine 28 hours prior to the test. In Dr. Greenwald's report she

draws the conclusion that the results of the cocaine tests disclose that the Grievor would have ingested the cocaine within a 12 hour period to being tested.

In her *viva voce* testimony, Dr. Greenwald stated that the results of the oral fluid test suggests that the previous consumption of cocaine by the Grievor would have been within a time frame of 2 to 8 hours before the test was taken. I note that the test was taken approximately 4 hours after his shift began.

I accept the evidence of Dr. Greenwald and conclude that the answer which the Grievor gave at the investigation about his time of consumption was dishonest.

The Union argues that the post-discharge evidence of Dr. Farnan - based on the history provided to him by the Grievor - that the Grievor's addiction to cocaine was at least a contributing factor to his ingesting cocaine prior to attending at work, established a *prima facie* case of discrimination which requires the Company to accommodate the Grievor.

In *Quebec Cartier* [1995] 2 SCR 1095, the Supreme Court states:

> *13 This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee.* ***In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator,***

> ***fair and equitable****. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal. To hold otherwise would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator.* ***Furthermore, it would lead to the absurd conclusion that a decision by the Company to dismiss an alcoholic employee could be overturned whenever that employee, as a result of the shock of being dismissed,*** *decides to rehabilitate himself, even if such rehabilitation would never have occurred absent the decision to dismiss the employee.*
>
> (emphasis added)

In *Stewart v. Elk Valley* Corp. [2017] 1 SCR 591, the Supreme Court commented on the test that must be met to prove *prima facia* discrimination:

> *[24] To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [Human Rights Code, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": Moore, at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39 (CanLII), [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination: Bombardier, at para. 40.*

Is a *Prima Facie* Case Of Discrimination Established

As stated in **CROA 4667**, cases involving the duty to accommodate, fit uncomfortably within CROA's monthly expedited arbitration regime. When complex and

developing legal issues are at stake, an Ad Hoc or even a regular arbitration with full *viva voce* evidence is far more appropriate. This was certainly one of those cases.

Nevertheless, it falls to the Arbitrator to reach a conclusion on the evidence that the parties have agreed to put before him/her in the **CROA** process.

Within that process and consequent available evidence, I have concluded that the Union has not made out a case of *prima facia* discrimination.

I arrive at this conclusion based on my lack of confidence in the veracity of the Grievor's statements; and, the fact that the expert opinion of Dr. Farnan was based on the information provided to him by the Grievor.

At the investigation stage, the Grievor was dishonest when he gave the time of his ingestion of cocaine as being 28 hours prior to the test.

According to Dr. Greenwald's evidence, he would have ingested the cocaine within 2 to 8 hours prior to the test. Accepting her evidence (Company Exhibit; Tab 11; at p. 7), as I do, it is more likely than not that the Grievor would have been impaired when he began work on the day in question.

However, at Q. 25, when asked if he was still feeling the effects of the cocaine he categorically stated:

> *"Absolutely not. I would not have come to work had I felt I was under the influence".*

Further, at Q. 39 he states:

> *"I want to make it very clear that I was not under the influence of any substance whatsoever while I was at work on that day. Nor have I ever been in my 9 and ½ years of employment..."*

More importantly, but equally critical to my findings, is the fact that he lied both to his previous addiction medicine expert as well as to Dr. Farnan. He told Dr. Farnan (at p. 7):

> *"… he stressed the importance that **he never used drugs at or before work shifts.***

And, (at p. 9):

> *"…indeed Mr. Yampolskyis stating that he did not use alcohol or cocaine at work or close to scheduled shifts…"*

Given the conclusions in Dr. Greenwald's evidence, those statements were, by definition, dishonest.

Dr. Farnan assessed the Grievor more than a year after the event occurred. His assessment, as noted, was based on what he was told by the Grievor himself.

Dr. Farnan allows that the determination of a possible nexus between the Grievor's medical diagnosis of addiction and behaviours that are related to his work performance are:

> *"...not an easy question to answer in retrospective **but based on the information available to me** I would consider that **more likely than not** there was an **acceptable connection** between Mr. Yampolsky's untreated, unstable addiction in early 2018 and him not adhering to his employer's alcohol and drug policy..."*

That conclusion cannot be taken without parsing the language to some extent. While I understand that, in the circumstances, Dr. Farnan based his diagnoses on the history provided to him by the Grievor, it is nevertheless apparent that *"more likely than not*" and *"acceptable connection*" are equivocal and ambiguous descriptors at best.

This equivocation is also apparent in other aspects of Dr. Farnan's report. At page 7 he states:

> *"… while addiction can be directly related to or have a casual connection to misconduct by an individual, the addiction is* ***not usually of such a nature as to remove the individual's complete control or exercise of choice in respect to a misconduct****; …*

Then, taking the comment by the Grievor that he never used cocaine at or before work shifts (which was untrue based on Dr. Greenwald's evidence), Dr. Farnan concludes:

> *"****With that in mind,*** *there is therefore often a mix of causes, eg a mix of addiction related conduct (i.e. non culpable conduct) and voluntary conduct (i.e. culpable conduct)."*

While not determinative – in and of itself - it is nevertheless apparent that the Grievor had a choice and chose to ingest cocaine within 2 - 8 hours prior to coming to work.

Based on the medical evidence that the Grievor made the choice to ingest the cocaine prior to work; his dishonesty with his expert addiction specialists; and his dishonesty at the investigation, I am unable to conclude – applying both the *Quebec Cartier* and *Elk Valley* decisions - that the Union established sufficient evidence for me to conclude that the protected characteristic (the Grievor's addiction) was a factor in the adverse impact and that a *prima facia* case for accommodation has been established.

Could The Grievor Have Been Accommodated?

Alternatively – but equally germane and determinative – even if the Union had established a *prima facie* case, I conclude that given: the severity of his breach, his past conduct, his previous record; his dishonesty; and, the crucial importance of "*deterring employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences",* the Company could not have accommodated the Grievor without undue hardship.

For the same reasons, mitigation of his penalty is not an option.

There is no dispute that, as a Locomotive Engineer, the Grievor was employed in a highly safety sensitive position.

There is a growing sentiment expressed in recent **CROA** decisions that view the ingestion of cocaine, while employed in a highly safety sensitive position, with the utmost seriousness.

In a recent decision (**CROA 4707)** Arbitrator Moreau discusses the seriousness of ingesting cocaine and reporting to work while impaired:

> *I conclude with the comment that cocaine is an illegal substance with [sic] can easily lead to devastating health and addiction consequences. To uphold the grievance in the face of the clear evidence that the grievor willingly took cocaine prior to starting work would be both*

> *contrary to recent arbitration awards of this Office and send the wrong signal to other employees in safety-sensitive positions who deliberately consume a toxic drug like cocaine before reporting for duty.*

Arbitrator Clarke, in **Ad Hoc 663**, reaches a similar conclusion. He notes that operating railway equipment while impaired is both a criminal offence and one of the most serious offenses an employee can commit. He quotes Arbitrator Schmidt SHP 726:

> *"An individual in the Grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors. Not only was the Grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. The Company's decision to discharge the Grievor in these circumstances was entirely appropriate and should not be disturbed."*

In addressing the issue of accommodation, it is important to take into consideration that the railway industry operates in a highly safety sensitive environment where even small "slips" can lead to enormous, if not devastating, consequences. The perils of showing up to operate a locomotive while impaired by drugs or alcohol are self evident. In examining whether or not an employee - who does just that - should/can be accommodated, it is incumbent on the tribunal to weigh workplace safety as a relevant consideration when assessing whether the employer has/can accommodate the employee to the point of undue hardship.

In *Elk Valley* the concurring Justices (Moldaver and Wagner JJ.) concluded that:

> *[55] In our view, it was reasonable for the Tribunal to conclude that Mr. Stewart's immediate termination was reasonably necessary, so that the deterrent effect of the Policy was not significantly reduced. Elk Valley's coal mining operation was a "safety-sensitive environment" … In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and*

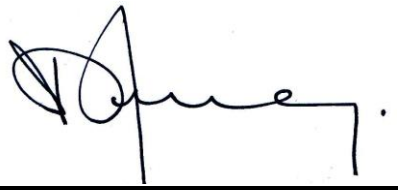
> *potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship: Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, at pp. 520-21.* ***Subjecting Mr. Stewart to an individual assessment or imposing an unpaid suspension for a limited period as a disciplinary measure instead of imposing the serious and immediate consequence of termination would undermine the Policy's deterrent effect. This, in turn, would compromise the employer's valid objective to prevent employees from using drugs in a way that could give rise to serious harm in its safety-sensitive workplace****. Therefore, the Tribunal reasonably concluded that incorporating these aspects of individual accommodation within the "no free accident" standard would result in undue hardship: see British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868, at para. 42.*

I adopt the reasoning of the concurring Justices and conclude that – notwithstanding the references to the "*no free accident*" policy which was in place in *Elk Valley* – their logic applies in equal measure in the present circumstances. It is critical for the Company, in the highly safety sensitive environment in which railway operations occur, "*to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences"*.

Clearly workplace safety – especially in the railway industry - is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship. In this case, imposing a limited disciplinary measure on the Grievor rather than termination, would undermine the Company's Policy which prohibits the use of drugs at or before work and leads to the prospect of serious and devastating harm.

Accordingly, I conclude that individual accommodation of the Grievor – even if a *prima facie* case had been established - would result in undue hardship for the Company.

The grievance is dismissed.



December 13, 2019

RICHARD I. HORNUNG, Q.C.
ARBITRATOR