CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4704

Heard in Montreal, October 11, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

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

DISPUTE:

Dismissal of C. Chambers.

JOINT STATEMENT OF ISSUE:

On November 1, 2018, the grievor C. Chambers, was issued a Form 104 advising him that he was being dismissed for his "violation of Canadian Pacific Engineering Camp Rules Section 1.2, 1.8 and 6.1 as evidenced by the alcohol found in your Company provided hotel room, your conduct unbecoming while in Company provided accommodation and your failure to report for duty on September 28, 2018." A grievance was filed.

Union Position:

The investigation conducted into the grievor's case was not fair and impartial in violation of section 15.1 of the collective agreement.

The Company has not met its burden of proof with respect to the presence of alcohol in the grievor's room.

The Company failed in its duty to accommodate this disabled employee.

The discipline assessed was excessive, unwarranted and not in keeping with the principles of progressive discipline.

The Union requests that the Company be ordered to reinstate the grievor immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

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

Company Position:

The Company maintains that the investigation of the grievor was conducted in a fair and impartial manner and no violation of the Collective Agreement occurred.

The Company maintains that the grievor was culpable for the incidents outlines in the Form 104 issued to the grievor on November 1, 2018.

The grievor failed to report his alleged illness prior to the incident.

The Grievor nor the Union has established that the grievor has an illness requiring accommodation. Furthermore, any related medical documentation to substantiate the grievor's alleged medical illness has not 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 Union has not established a nexus between the alleged illness and the grievor's misconduct.

The discipline assessed was reasonable in all the circumstances and was keeping with the principles of progressive discipline.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.) W. McMillan**
President	Manager, Labour Relations

There appeared on behalf of the Company:

D. Pezzaniti	– Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

H. Helfenbein	– Vice-President, Medicine Hat
G. Doherty	– President, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The grievor, who was hired by the Company on May 2, 2011, and was working at the material times as a Group 4 Machine Operator, was dismissed on November 1, 2018 for:

> *Violation of Canadian Pacific Engineering Comp Rules Section 1.2, 1.8 and 6.1 as evidenced by the alcohol in [his] Company provided hotel room, [his] conduct unbecoming while in Company provided accommodation and [his] failure to report for duty on September 28, 2019.*

From all of the material before me, it is clear that the grievor did commit each of the offences listed. On September 28, 2018, the grievor was part of a crew staying at Cochrane, Alberta. The grievor was not in the same hotel as the rest of the crew, as he was no longer welcome at that hotel, where he had caused damages in an incident the year before. It does not appear that any discipline was imposed in respect of that incident. At 04:40 on September 28, the grievor was awakened by an RCMP Constable who had been called because the grievor was asleep in a chair in the lobby of his hotel with an unopened 6-pack of beer beside him on the floor. The Constable helped the grievor back

to his room, and then reported the matter to the grievor's supervisor. The grievor was abusive and somewhat belligerent toward the Constable who, to his credit, noted it as "nothing new in this line of work".

Later that morning, when the grievor did not report for work, the supervisor went to the grievor's room with the hotel manager. They found the grievor asleep on his bed, still fully clothed. They awoke the grievor with some difficulty. He appeared confused and smelled of alcohol.

Although the grievor denied having consumed enough alcohol that he could not make it to his room, or that he became tired and decided to sleep in the lobby, I have no doubt that his conduct was in fact in violation of the Company's policies as set out above, and in my view there was just cause for the imposition of discipline in this case.

The Union argues that the discipline imposed is void, because of the Company's failure to provide a fair and impartial investigation as required by the collective agreement. The investigation, it is argued, was vitiated by the investigating officer's putting the following question to the grievor, at the outset of the investigation:

> *Do you understand that investigations are conducted in an effort to get to the facts of any given situation or incident and CPR expects its employees to answer all questions in a truthful manner and to give false or misleading information in an investigation may result in the appropriate disciplinary action being taken?*

The grievor answered "yes" to the question. The Union objected that the question was a bullying tactic used to intimidate the grievor. In my view, that is not a reasonable

interpretation of the question, which was in effect no more than an appropriate reminder that this was a serious matter and that it was important to tell the truth. The grievor appears to have understood that, and the objection was not well-founded.

The Union further argued that the Company was under a duty to accommodate the grievor in respect of his disability. The alleged disability, in the material before me, is variously referred to as a congenital "Intellectual Disability of moderate severity", "depression and anxiety", "personal issues", "substance abuses" and other expressions. To some extent, the Company was aware that the grievor had problems. Thus, a copy of a psychology consultation, conducted by Alberta Health Services, and reported on May 29, 2019, was sent to the Company. The assessment, it seems, was requested "to help determine if [the grievor] would qualify for Assured Income for the Severely Handicapped". The material before me does not, however, support a finding that the grievor has a specific disability or disabilities for which workplace accommodation is to be sought. Nor is there any indication as to how any such accommodation might be affected (apart from the withholding of discipline).

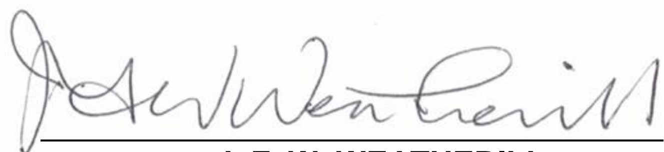
In all of the circumstance, I conclude that a case has not been made out with respect to an obligation to accommodate. There remains the question whether the penalty imposed – discharge – was within the range of reasonable disciplinary responses to the situation.

The grievor is an employee of some seven and one-half years' service. Over that period, he has received two cautions, two assessments of demerits (for a total of 25

demerits, both instances over five years old) and a suspension. Most of these represent attendance problems. In **CROA 3804**, an employee of twenty-four years' service, but whose absenteeism rate was 57% was reinstated, although on very strict terms. In **CROA 3799**, the grievor had only two years of service, during which time she had been late, absent, or left work early on 103 occasions. She was reinstated without compensation and on condition of maintaining a rate of attendance not less than the average of her peers in the workplace. While each case must be determined on its own facts, it is my view that the discharge of the grievor was excessive in the circumstances of this case. The assessment of 20 demerits, or at most 30, might have been appropriate, and in neither case would that have led to an accumulation of 60 demerits, which under the Brown System, would have subjected him to discharge. There are no precise equivalencies with the Brown system and a system relying on suspensions, but in all of the circumstances it is my view that a substantial period of suspension would have been appropriate.

For all of the foregoing reasons it is my award that the discharge be set aside and a 25 day suspension be substituted therefor, without loss of seniority or benefits, save that, having regard to his attendance problems the grievor shall receive (after deduction of the 25 day suspension) compensation for 80% of his loss of regular earnings.

December 2, 2019



J. F. W. WEATHERILL
ARBITRATOR