

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4753

Heard in Montreal with Video Conferencing, July 15, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

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

DISPUTE:

Dismissal of Mr. R. Lovelock.

THE UNION EXPARTE STATEMENT OF ISSUE:

On April 8, 2019 the grievor, Mr. Richard Lovelock, was dismissed from Company service for (1) his alleged failure to disclose accurately his use of substances during his pre-employment screening and (2) his consequent alleged violation of the Employment Medical Report Form he signed on February 19, 2018. The Union objected and a grievance was filed.

The Union contends that, the Company violated sections 15.1 and 15.2 of the collective agreement: The Company failed in its duty to accommodate this disabled worker; The grievor's rights to privacy were violated, the grievor did not lie during the pre-employment process; Mitigating and other contributing factors were not taken into consideration; The Company has failed to satisfy its's burden of proof; The discipline assessed was unfair and unwarranted.

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.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On April 8, 2019 the Grievor, Mr. Richard Lovelock, was dismissed from Company service for:

"not disclosing pertinent information on your pre-employment medical. More specifically, your failure to accurately disclose your use of substances during your pre-employment screening.

As a result you have violated the Employment Medical Report Form that you signed on February 19, 2018, which states:

I declare that the information that I have provided or will be providing to the examining physician is truthful and complete. I understand that if I knowingly have provided false information or have not declared a medical

condition, past or current, I will be subject to action by Canadian Pacific (CP) up to and including dismissal.

I acknowledge that during my employment, if any facts suggest that I have provided false information or not declared a medical conditions as noted above, I may be removed from service and be subject to a formal investigation, which may result in action up to and including dismissal.”

The Union objected and a grievance was filed.

COMPANY POSITION:

The Company complied with sections of 15.1 and 15.2 of the Collective Agreement.

The Grievor failed to disclose information concerning prior drug use on his Employment Medical Report Form signed on February 19, 2018.

The Grievor failed to disclose his known medical history which he signed and attested to being a thorough and accurate representation of his medical history which is a violation of the conditions set forth in the Employment Medical Report Form.

Had the Grievor disclosed his complete medical history on the Employment Medical Report Form it would have impacted the employment process.

All factors were taken into account and given all the circumstances; the Company maintains that the discipline assessed was appropriate in all the circumstances.

FOR THE UNION:
(SGD.) G. Doherty

President

FOR THE COMPANY:
(SGD.) J. Bairaktaris

Director, Labour Relations

There appeared on behalf of the Company:

F. Billings – Manager Labour Relations, Calgary
D. McGrath – Manager Labour Relations, Calgary

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

1. The issue giving rise to this dispute is the dismissal of Mr. Lovelock for his alleged failure to accurately disclose pertinent information regarding his use of substances during his pre-employment screening. The Union claims that Mr. Lovelock was honest in his pre-employment screening and that his right to procedural fairness was denied as he was not provided the evidence in its entirety. Consequently, the dismissal should be declared null and void.

2. After carefully reviewing the submissions, materials, and jurisprudence before me, I find that the Mr. Lovelock was denied a fair and impartial investigation. The dismissal is consequently declared null and void for the following reasons.

3. Mr. Lovelock entered Company service in March of 2018. As part of the hiring process, he completed pre-employment medical forms. The forms included questions related to the usage of alcohol and drugs. Mr. Lovelock denied having used any illegal drugs or having been in a treatment program for alcohol/drug addiction.

4. On November 12, 2018, Mr. Lovelock did not report to work. The next day, he texted his supervisor to inform him that he was in the hospital for an overdose. Mr. Lovelock claimed he lost custody of his son, became highly dependent on opioids, and almost died. He was seeking help and asking the Company for assistance.

5. The Company referred Mr. Lovelock to the Employee Family Assistance Program ("EFAP"). The telephone assessment with the EFAP personnel was conducted on November 18, 2018. He confided that he had a substance abuse problem and needed help. During the telephone assessment, it appears Mr. Lovelock disclosed a history of drug use. No further contact or assistance was provided by EFAP pending the outcome of the investigation.

6. On January 9, 2019, the Company was informed by way of memorandum, that medical information was received from an assessment made by EFAP in November

2018. The memorandum states that Mr. Lovelock did not disclose medical information during the hiring process, which would have impacted the employment process. The Company scheduled an investigation meeting within one week of the receipt of the information. Due to an incorrect mailing address and Mr. Lovelock's inability to attend, the meeting was rescheduled several times and delayed by almost two months.

7. The investigation meeting with the Company was held on March 13, 2019. The Company questioned Mr. Lovelock about his alleged non-disclosure of relevant medical information during the hiring process. He denied such. Rather, he claimed that at the time of hire, he did not suffer from a substance dependency. He said: "*I have zero history of drug addiction or drug problems.*" Mr. Lovelock responded he developed the addiction after he was employed with the Company.

8. Further, the Investigation Officer asked Mr. Lovelock why the Company's Health Services stated he did not provide relevant medical information during his pre-employment assessment. Assuming the Company was relying on information obtained from the EFAP program, Mr. Lovelock explained it was not reliable information as he was under the influence of opioids at the time of his conversation with EFAP. He was crying out for help and claims he "*completely fabricated*" a history of substance abuse to maximize his chances of being sent to a rehabilitation program. Mr. Lovelock did not remember the extent of the conversation held five months prior with EFAP and requested a copy of the assessment.

9. Although the subject matter of the EFAP assessment is Mr. Lovelock, the Company asserts that the assessment is private, and on that basis, provided Mr. Lovelock with a heavily redacted version. The only unredacted portions of the assessment are Mr. Lovelock's assertions related to drug use. The Company relied on the confidential discussions between EFAP and Mr. Lovelock to conclude he had falsified information at the time of hire and subsequently discharged him from his employment. The provision of the redacted copy of the assessment raises questions as to procedural fairness.

10. According to section 15.1 of the Collective Agreement "*no employee shall be disciplined or discharged until a fair and impartial investigation has been conducted and responsibility established.*" Section 15.2 of the Collective Agreement stipulates that when a disciplinary meeting occurs, "*the employee will have the opportunity to review all evidence taken immediately prior to the commencement of the hearing.*" Mr. Lovelock was denied that opportunity. The Company contends that the EFAP assessment was redacted due to privacy concerns. I disagree. Mr. Lovelock was entitled to receive a full, unredacted copy of the evidence, including any information that the Company relied upon to dismiss him. Privacy cannot be proffered as a reason for the Company's failure to provide Mr. Lovelock with the unredacted EFAP assessment as he is the subject of the document.


11. This Office has consistently declared discipline to be null and void in situations where a grievor was denied a fair and impartial investigation, even when discipline was

assessed for obvious wrongdoing.¹ I find that there was a fatal procedural error in this matter. Mr. Lovelock was denied a fair and impartial investigation and as a result, the dismissal is null and void.

12. Moreover, I would be remiss if I did not comment on the purpose of EFAP. It is to provide employees and their families with support when faced with challenging times. The services are strictly confidential and are presented as such to individuals reaching out for assistance, in order to protect their right to privacy. It is rather troubling that the Company relied solely on such confidential information to dismiss Mr. Lovelock from his employment.

13. Mr. Lovelock is to be reinstated into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost. Considering the medical situation, I remit the matter to the parties to discuss the appropriate return to work protocol.

14. I will retain jurisdiction should any difficulties arise with respect to the application, interpretation, and implementation of this award.



August 7, 2020

AMAL GARZOUZI
ARBITRATOR

¹ CROA & DR 3322, 3420, 3786 and SHP 674.