CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4762

Heard via Video Conferencing, September 9, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. Miguel-Angel Marroquin Salazar.

JOINT STATEMENT OF ISSUE:

On February 14, 2019, the Grievor, Mr. Miguel-Angel Marroquin Salazar, was dismissed by the Company via two separate Form 104s for; 1) Insubordination towards a Company officer, for leaving work early without authorization, and for making contact with a train, all of which occurred on December 20, 2019. And 2) Violation of CROR Rule G, Rule 18.0 (h) of the Engineering Rule Book, HR Policy 203 and HR procedure 203.1, when you worked as a flagman on December 20, 2018.

The Union objected to the dismissal and a grievance was filed.

The Union contends that:

1) The Grievor made it clear to the Company that he had a substance abuse problem at his February 12, 2019 investigation. He had previously met with an EFAP representative on January 23, 2019. In fact, he had experienced medical problems since 2013. By summarily terminating the grievor, the Company violated its duty to accommodate.

2) All of the Grievor's inappropriate behaviour can be attributed to his disability. The events of December 14, 2019 were isolated and not characteristic of the grievor's overall performance as a CP employee. In addition, the grievor was truthful throughout the investigation process, showed real remorse, and has actively taken steps to rehabilitate himself.

3) The discipline assessed the grievor was unfair, excessive and unwarranted.

The Union requests that, the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all wages and benefits lost.

Company Position:

1) The Company issued two separate issuances of discipline, the assessment in each being dismissal. Each assessment of discipline should be considered separate and reviewed upon its own merits.

2) The Company maintains that the Grievor left work early without authorization and while leaving Company property made contact with the side of a train. Upon being approached by a Company officer, the Grievor was became aggressive and insubordinate.
3) The Grievor made contact with the side of a train that was occupying a crossing and subsequently post-incident alcohol and drug tested. The Grievor tested positive for alcohol and drugs in his breath alcohol drug test, oral fluid drug test, and urine drug test on December 20, 2018. As per the Grievor's positive breath and oral fluid test, the Grievor was unfit for duty and in violation of CROR Rule G.
4) The Company maintains no violation of duty to accommodate occurred as the Grievor had never sought medical consultation, nor did he ever request for an accommodation with the Company prior to the incident, in order to substantiate any alleged medical disability and/or substance use disorder.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.) D. Guerin**
President	Senior Director, Labour Relations

There appeared on behalf of the Company:
F. Billings – Labour Relations Manager, Calgary
D. McGrath – Labour Relations Manager, Calgary

And on behalf of the Union:
D. Brown – Counsel, Ottawa
H. Helfenbein – Vice General Chairperson, Medicine Hat

AWARD OF THE ARBITRATOR

1. Following two separate investigations the Grievor was dismissed via two separate Form 104's as follows:

> *1) For insubordination towards a Company officer, for leaving work early without authorization, and for making contact with a train, all of which occurred on December 20, 2019. And,*
>
> *2) Violation of CRO Rule G, Rule 18.0 (h) of the Engineering Rule Book, HR Policy 203 and HR procedure 203.1, when you worked as a flagman on December 20, 2018. (Company Tab 1)*

2. On December 20, 2019 the Grievor was scheduled to work at his regular shift from 01:00 to 08:00. At approximately 05:45 on December 20th, the Grievor attempted

to leave the yard without advising his Supervisor. He did so having received information from his mother that his father did not feel well and had been taken to the hospital.

3. While leaving the yard, he stopped for a train that was occupying the crossing. As he waited for the train, he left his vehicle in drive and fell asleep. The car rolled forward and struck the side of the train.

4. The police were called and the Grievor was given a drug and alcohol test. The test proved positive for both cocaine and alcohol in his system (Investigation; Company Tab 6; Q's 20 / 21).

5. The Grievor admitted, in his investigation (Q.6), that his shift began at 01:00 and was to run until 08:00.

6. At Q.18, the Grievor describes the drugs and alcohol he consumed on December 19 and 20, 2018.

> *Q. Can you tell me at approximately what time you consumed the alcohol?*
>
> *A. I drank 3 to 4 glasses of wine with supper at 20:00 on December 19 and also around 00:01, I drank the "mixer." A "mixer" is a large pitcher of alcohol: 1/4 bottle of tequila, 1/4 bottle of vodka, 1/4 bottle of rum, mango juice and a packet of cocaine.*

7. At Q.19 the Grievor confirms the time at which he last consumed alcohol/drugs prior to attending work.

> *Q. Can you tell me when you last used drugs prior to the test carried out on December 20, 2018?*

A. Around 0100 on December 20, 2018.

8. And, finally, at Q.20 he states:

Q. What substance was consumed?

A. Cocaine.

9. When he attended at the investigation, the Grievor advised that following the incident he had requested help from the EAP concerning his consumption of elicit substances, on January 21, 2019 and his next scheduled appointment was on February 15, 2019.

10. As stated, his dismissal took place on February 14, 2019.

11. The Union does not dispute the facts. Rather, it argues that having regard to the Grievor's disclosure at his investigation, the day prior to his dismissal, that he had a drug and alcohol problem, the Company was obligated to accommodate him.

12. Prior to filing a grievance in that regard on August 17, 2019 (Union Tab 4), the Company advised, on July 8, 2019 that:

> *[…] because of the seriousness of the infraction that caused damage to CP equipment and posed a significant safety concern, the "duty to accommodate" was not considered a viable option for the Company and the grievance at hand.*

13. The Union argues that the behaviour of the Grievor was out of character considering that his 4 occasions of discipline between 2011 and 2018 all involved unauthorized absences from work. It argues that this Office has long recognized that

"*out of character*" behaviour by an employee is a legitimate factor to be considered in accommodation cases.

14. It argues that absences from work are commonly associated with workers who suffer from alcohol or drug addiction and asserts that the uncharacteristic events of December 20, 2018, coupled with the Grievor's recent attendance issues, should have suggested to the Company that it had "**a possible duty"** to accommodate him. It asserts that the comments of the Company - earlier referred to - wherein it dismissed the applicability of the duty to accommodate, reflects the Company's realization of that fact.

15. In attempting to establish a duty in this case, the Union refers to **CROA 4131** and the Arbitrator's comment that:

> *It is sufficient that the Employer **has reasonable knowledge** of the condition to trigger the obligation of accommodation.*
> *(emphasis added)*

16. It asserts that, in the present case, having regard to the Grievor's admission to drug and alcohol problems at the investigation stage, the Company had reasonable knowledge of the Grievor's condition sufficient to trigger the duty

17. In **CROA 4653**, this office dealt with a similar circumstance where the alleged addiction was first raised by the Grievor at the investigation stage.

18. In that award, the Board states:

> *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.*** (emphasis added)
>
> *[...]*
>
> > *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.*

19. Similar to the circumstances in **CROA 4653,** the Union presented evidence that showed that the Grievor, post incident, obtained counseling and treatment in support for his drug/alcohol use problem. As stated there:

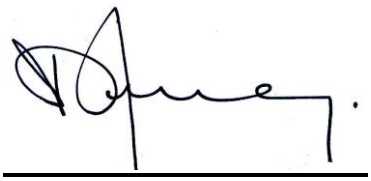
> *[…] It is apparent that, following his dismissal, the Grievor clearly appreciated the value of his job and (attempted to illustrate) to the Company both that he was drug free and his obvious desire to be re-instated to his previous position. However, as Arbitrator Flynn observed:*
>
> > *It is not 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]*

20. The evidence here does not meet the evidentiary threshold – referred to above - to establish a link between the misconduct at issue and the Grievor's alleged addiction. As a result, as concluded in **CROA 4653**:

> *… 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.*

21. In the circumstances, I am unable to arrive at the conclusions urged on me by the Union.

22. The Grievance is accordingly dismissed.



September 21, 2020

RICHARD I. HORNUNG, Q.C.
ARBITRATOR