CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4829

Heard in Edmonton, June 20, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Claim on behalf of C. Hadley.

JOINT STATEMENT OF ISSUE:

On May 5, 2022 the Company served the Grievor, Mr. Chris Hadley, with the following letter:

This letter is in relation to the formal investigation you attended on April 7, 2022. During the investigation it was established that on March 17, 2022 you disclosed to CP's Disability Management team that you had relapsed on March 4, 2022 and that you came to work following your relapse until March 17, 2022. This is a violation of the terms and conditions of your Structured Relapse Prevention Program (SRPP) through CP Health Services, LifeWorks Workplace Support Program and return to work agreement that you signed on December 22, 2021.
As a result you have been dismissed from Company Service effective on May 6, 2022 for the following reason(s):
Violation of the following policies, including but not limited to:
Structured Relapse Prevention Program (SRPP)
HR 203.1 Alcohol and Drug Procedures (Canada) 3.2.2
HR 203.1 Alcohol and Drug Procedures (Canada) 3.2.6
HR 203.1 Alcohol and Drug Procedures (Canada) 3.2.8
Return to Work Agreement, Step 2 Relapse Prevention, Item 2, Bullet Point 2

The Union objected to the Grievor's dismissal and filed a grievance on June 6, 2022. The Company declined the grievance by way of letter dated July 7, 2022.

The Union contends that:

1. The grievor, an individual with a known and well-documented disability who had worked for the Company since May 2011, experienced a relapse on March 4, 2022. The grievor self-reported the relapse. By dismissing the grievor, the Company violated the duty to accommodate;

2. As stated in the June 6, 2022 grievance, “during the disciplinary investigation on April 7, 2022, Mr. Hadley was open and honest with the Company. It was clearly conveyed to CP by Mr. Hadley that he was quite ashamed of his actions, Mr. Hadley also expressed the steps he was taking to ensure there was no repeat event.”

3. The dismissal of the grievor was improper and unwarranted.

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

Company Position:

1. The Company denies the Union’s contentions and declines the Union’s request. The Company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

2. The Grievor signed and accepted a relapse prevention agreement on December 22, 2021 which outlined terms and conditions, one of which was total abstinence from all legal, illegal or illicit drugs and other mood altering substances. The agreement also outlined the consequences of noncompliance, which included dismissal for: failure to disclose a relapse; use of prohibited substances prior to any incident; and positive biological test.

3. Despite agreeing to the terms and conditions of this agreement and knowing the consequences of non-compliance, the Grievor failed to disclose a relapse and came to work between the date of relapse and the date of disclosure putting his safety and the safety of others at risk.

4. The Company maintains it fulfilled its duty to accommodate by offering the Grievor a relapse prevention agreement. To further accommodate the Grievor would place the Company in a position of undue hardship.

5. For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:
(SGD.) W. Phillips
President, MWED

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director, Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager, Labour Relations, Calgary
S. Oliver	– Manager, Labour Relations, Calgary
F. Billings	– Assistant Director, Labour Relations, Calgary (Observer)

And on behalf of the Union:

W. Phillips	– President, Ottawa
D. Brown	– Counsel, Ottawa
C. Hadley	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

1. The issue to be determined in this Grievance is whether the Company has satisfied its obligation to accommodate the Grievor to the point of undue hardship. There is no

dispute that the Grievor suffers from a substance abuse disorder and that he relapsed, or that this relapse was in contravention of a tri-partite Relapse Prevention Agreement between the Union, the Grievor and the Company, which was executed in December of 2021 (the “Agreement”).

Facts

2. The facts are straightforward. The Grievor has been employed since May 2011. The Grievor’s discipline record is notable for a 30 day suspension (which ended on March 9, 2022) along with a six month restriction from occupying his former position as Track Maintenance Foreman, both for being found in a sleeping position while on duty (assessed in early February of 2022). The next most recent incident is from 2016.

3. The Grievor has a known and documented disability involving substance abuse, which the Company has been accommodating through various measures since April of 2013, when the Grievor lost his driver’s licence due to alcohol consumption. At that time, the Company agreed to accommodate the Grievor in a Track Maintainer position, which is safety sensitive, in view of his substance abuse disorder. In August of 2013, the Grievor entered into a “Confidential Contract for Successful Treatment” with the Company, which required him to enter treatment for his substance abuse disorder and to comply with any requirements of that treatment. He acknowledged he would be withheld from service if he breached that contract. More than four years later, in early 2018, the Grievor was investigated for allegedly reporting for duty in an unfit condition. Following an investigation – and due to the intervention of the Union – the Grievor was offered a last chance agreement in May of 2018 relating to his substance abuse disorder. This agreement provided for unannounced testing over a two year period, which period passed without

any violations. In the fall of 2021, the Grievor had been off work due to what his doctor described as “mental health” concerns. As part of the protocols to assess the Grievor’s fitness to return to work, an independent wellness adjudicator determined the Grievor required a Substance Abuse Professional Assessment (“SAP”).

4. There were documented issues with the Grievor’s lack of participation and lack of honesty during this SAP process, in November of 2021. It was noted that the Grievor was not forthcoming with his past or present substance issues, was angry at being questioned, used foul language throughout the interview, demonstrated a lack of insight into his difficulties, and - when asked about his prior substance use - indicated to the assessor that she could “write down whatever would make him look good”. He had also refused to answer follow up questions. The Grievor was ultimately returned to work under a tri-partite Agreement, which was executed by the Grievor, the Union and the Company on December 22, 2021. The Agreement had two sections: Step 1: Pre-Treatment; and Step 2: Relapse Prevention. This grievance concerns those terms contained in Step 2.

5. Article 1 required “total abstinence” from all legal or illegal drugs, including alcohol and cannabis. Article 8 provided that if the Company determined that the Agreement was violated after that Investigation, certain terms would apply. Article 8(a) was one of those terms. It stated that the Company “in its sole discretion, may elect to terminate employment” for three events: failure to disclose a relapse; use of prohibited substances prior to any incident; and a positive biologic test. Article 8(b) stated that any other violation would be considered as “just cause” for discipline under the Company’s discipline guidelines.

6. Article 8(c) provided that any grievance against the discipline would only be for the "purpose of determining whether you violated or failed to comply with the terms and conditions of Step 2…", while Article 8(d) limited the jurisdiction of the arbitrator to substitute any lesser penalty:

> d) 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 you violated or failed to comply with any of the terms and conditions of this Agreement or the Canadian Pacific Railway Alcohol and Drug Policy and procedures (HR-203, HR 203.1 & HR 203.2)

7. There is no issue between the parties that the terms of Step 2 of the Agreement were violated by the Grievor: On March 17, 2022, the Grievor disclosed to the Company that he had relapsed on March 4, 2022, by using alcohol, cannabis and cocaine. At the time of relapse, the Grievor was serving his 30 day suspension. He continued to work between returning from his suspension and March 17, 2022, when he disclosed his use. The self-disclosure took place one day before the Grievor was scheduled to have a biological monitoring test performed as part of the monitoring requirements under the Agreement. In view of his disclosure of use, no biological monitoring testing took place on March 18, 2022. According to the records of the Company, the Grievor contacted Disability Management personnel and asked about the consequences of disclosing a relapse before having a test versus having a positive test result. He was asked if he had relapsed and he said "yes".

8. The Company elected to dismiss the Grievor in May of 2022 for violating the Agreement. At that time, it was noted by the Disability Management personnel of the Company that the Grievor's issues were complex; his prognosis was poor; his counsellor

was relatively new to the field and “may not have the experience” necessary to address the Grievor’s issues; he lacked insight, and that he had entered treatment programs twice. The Company was not confident the Grievor would be successful in another round of treatment. His substance use disorder was described as “severe” and his issues “complex”. A grievance was filed on June 6, 2022. The Grievance alleged the Company had failed in its duty to accommodate the Grievor’s disability.

Arguments

9. The Union argued an arbitrator is entitled to disregard the strict terms of this Agreement and in particular Article 8, as it is well-settled that a violation of a last chance agreement will not automatically result in a finding of unjustified dismissal and cannot violate the duty to accommodate owed by the employer: **CROA 3269; CROA 4033; CROA 3479.** It urged the parties cannot contract out of human rights’ protections and an arbitrator must instead consider the merits of whether the Company has satisfied its duty to accommodate the Grievor. According to the Union, the dismissal in this case was excessive, unwarranted, an overreaction and was in violation of the duty to accommodate, as the Company did not consider that cases of dependency are marked by early lapses or relapses. The Union argued this case was distinguishable from **CROA 3415**, as there was only one relapse under a return to work agreement in this case, while there were three relapses in **CROA 3415.** The Union also noted the May 2018 relapse agreement was satisfied, as the Grievor completed the two year period of testing without violation. The Union also urged that CROA jurisprudence supports the reinstatement of individuals who can provide evidence of rehabilitative efforts to maintain their sobriety post-termination: **CROA 4054, CROA 4511, CROA 4652** and there was that evidence in

this case (letters from the Grievor's counsellor and from the Grievor's sponsor). The Union noted the Grievor began counselling in November of 2021, *before* his relapse in March of 2022 and that he was also enrolled in a program to assist others with their addiction, both of which speak to the strength of his commitment to maintaining his sobriety. The Union also noted the Grievor self-disclosed, rather than failed a biological monitoring test. It pointed out the Grievor's disclosure was because his relapse was "weighing on his conscience".

10. For its part, the Company noted the Grievor's disclosed substance use was in violation of the Agreement. It argued a second violation of the Agreement also occurred, as the Grievor was required to "immediately" disclose any relapse and did not do so, but rather continued to attend work even after his relapse, between March 9, 2022 and March 17, 2022. The Company argued the terms of the Agreement were clear, as were the consequences. The Grievor was aware he would only have limited recourse to arbitration, and the Company acted in accordance with the Agreement. It urged there is arbitral respect for such agreements: **CROA 2632**; **CROA 2743.** It argued the Agreement was the Grievor's "fourth chance" given by the Company to allow him to address his substance abuse disorder while retaining his employment. While relapses are to be expected, the Company argued the duty to accommodate did not require indefinite or endless tolerance: **CROA 4773, CROA 3415.** The Company argued it had fully supported the Grievor through his addiction and that the point of undue hardship had been reached. The Company also disagreed with the Union's characterization of the Grievor's self-disclosure, as the Grievor's contact was to inquire about the consequences of disclosing a relapse as opposed to testing positive during a biological monitoring test, which had

been scheduled for the next day. Regarding rehabilitative potential, the Company took issue with the Union's reliance on the letters relating to the Grievor's post-termination conduct, arguing this was subsequent-event evidence that an arbitrator does not have jurisdiction to consider: *Cartier v. USW, Local 6869.* It also noted the relapse occurred *after* the Grievor began counselling, which called into question the effectiveness of that counselling and undermined the Union's argument that the Grievor was diligent about battling his addiction. It further argued the safety-sensitive nature of the Grievor's work is relevant to the question of whether the point of undue hardship has been reached: **CROA 4700**.

Analysis and Decision

11. CROA jurisprudence has balanced the deference that is granted by arbitrators to last chance agreements - which are freely entered into by grievor, his or her union and the employer - with the primacy and over-arching human rights obligations imposed on employers by statute to accommodate employees with substance abuse disabilities.

12. This is well-illustrated by **CROA 3198,** which is a 2001 decision of this Office, relied on by the arbitrator in **CROA 4511**. The grievor in **CROA 3198** had a long-standing substance abuse problem. Arbitrator Picher recognized the primacy of the human rights obligations, but noted that context – including the parties' agreement on what would constitute undue hardship in future - was an important factor to consider:

> The history of Mr. Davidson's treatment does not, in the Arbitrator's view, sustain the Union's argument that he is the victim of arbitrary or discriminatory disregard of his rights under the **Canadian Human Rights Act**. On the contrary, the evidence reveals that the Company acknowledged and responded to what it perceived as Mr. Davidson's record of substance abuse dating back to 1990 by providing him an opportunity to pursue a

> course of follow up treatment as a condition of continued employment pursuant to the agreement which he and his Union signed on November 12, 1997… [which] satisfied the requirement of reasonable accommodation to which he was entitled in light of his acknowledged substance abuse problem. Indeed, on the facts of this case the Union's consent to the continuing employment contract can fairly be construed as an agreement on its own part that the arrangement was itself a fair accommodation of Mr. Davison's conditions, and that any requirement to employ him in the face of his failure to meet the conditions would constitute undue hardship… (at p. 5, 6, emphasis added).

Arbitrator Picher also pointed out that the grievor and the Union had a choice not to accept the terms of the agreement and grieve the dismissal which led to its execution:

> The grievor and the Union obviously had the choice to decline to sign the agreement and to pursue Mr. Davidson's rights under the grievance and arbitration provisions of the collective agreement, if they chose to do so. I am satisfied that in all of the circumstances they can fairly be taken to have essentially agreed that the last chance agreement was a suitable form of accommodation (at p. 6, emphasis added).

13. After stating this, the arbitrator then went on to consider whether the point of undue hardship had been reached and held it had (at pp. 5 and 6). It is significant he did not just accept the parties' own determination. He considered the safety sensitive nature of the grievor's work as well as the Company's efforts at accommodating his condition (which included the substantive terms of the last chance agreement). He also found that this Office "should uphold the agreement made by the parties, for reasons well articulated in prior jurisprudence". He stated:

> Such agreements obviously have little value to employers, in the words of Arbitrator Lynk at p. 328 of the **Canadian Waste Services** award…[referring to *Re Canadian Waste Services and C.L.A.C. (McGee)* (2000) *91 L.A.C. (4th) 320]…*"If they can [sic] easily undone by a grievor's claim that her or his unexpected or unintended relapse caused….[sic] breach of the LCA…". (at p. 6).

Arbitrator Picher also noted multiple cases from this Office for the same proposition, after this quotation (at p. 6).

14. Both parties relied on **CROA 3415,** another decision by Arbitrator Picher of this Office, decided a few years later in 2004. **CROA 3415** assessed the termination of a grievor who suffered from a substance abuse disorder, which had resulted in termination on two previous occasions. This Office reinstated the grievor on both those occasions (**CROA 2716** and **CROA 3355**). In **CROA 3355**, this Office also imposed certain conditions on the grievor, which were conditions which had been proposed by the union, at the hearing. Those conditions were: The Grievor had to abstain from all drugs and alcohol for the remainder of his employment, would be subject to random testing and was accommodated into a position that was not safety-sensitive. The arbitrator in **CROA 3355** also imposed two further conditions relating to a further relapse:

> Failure to abide by any of the foregoing conditions **shall render the grievor liable to discharge, with access to arbitration only in respect of the issue of whether he did violate any such condition or conditions** (emphasis added)**.**

15. In **CROA 3415** the arbitrator characterized these conditions - including the final conditions imposed by the arbitrator (and suggested by the union) - as a “last chance” opportunity. The arbitrator noted these conditions were justified due to the “very real alternative of [the grievor’s] termination” (at p. 2).

16. The arbitrator also considered the impact of the conditions imposed in **CROA 3355,** for assessing whether the duty to accommodate had subsequently been satisfied in **CROA 3415:**

> In the case at hand the conditions for reinstatement, which were in fact proposed by the grievor himself through his bargaining agent at the hearing in CROA 3355, were themselves the measures whereby accommodation was to be achieved….The continued employment of an addicted individual, subject to conditions fashioned to deal with his or her disability, is an instrument common in the workplace….unions frequently enter such arrangements with employers precisely for the purpose of allowing an individual to continue his or her employment while overcoming or gaining control of an addiction to alcohol or drugs… Such arrangements, which also can be fashioned remedially by boards of arbitration, are of the essence of the attempt to provide reasonable accommodation to an employee afflicted with a disability of alcohol or drug addiction…Regrettably, the most recent relapse takes Mr. Martin's circumstances into the area of undue hardship for his employer to the extent that he has been unable to remain faithful to conditions *which his own bargaining agent proposed at arbitration.* (at pp. 3,4, emphasis added)

17. A condition limiting access to arbitration was also imposed by the arbitrator in **CROA 4054** (decided in 2011, at p. 4) and in **CROA 4511** (decided in 2016, at p. 7).

18. The parties have essentially picked up the conditions from **CROA 3355** as quoted in paragraph 14, above, and included them in the Agreement at issue in this case. The question is whether they are entitled to "contract out" of arbitral review of their "undue hardship" decisions in this manner.

19. The answer to that question is "no". Arbitrators can impose such conditions; parties cannot. While CROA jurisprudence has provided considerable deference to last chance/relapse prevention agreements in cases of multiple relapses, arbitral jurisprudence – both broadly and in this industry – is also in line with the conclusion reached in *Re Canadian Waste Services Inc. and C.L.A.C. (McGee),* that such agreements are not immune from review by an arbitrator for compliance with fundamental statutory human rights obligations:

> …[I]t is important to recognize that recent rulings by the courts and by arbitration boards have clearly held that LCAs are not immune from human rights obligations. Arbitrators are required to read LCAs with [human rights

> statutes] and other relevant employment statutes in mind, and they must ignore or nullify any provisions that would breach, even unintentionally, the principle that industrial relations parties cannot contract out of their statutory duties [citing four decisions] (at p. 328, emphasis added).

20. Any terms which attempts to "contract out" of statutory obligations – even unintentionally - will be found to be unenforceable.

21. While there must be an appreciation for both the policy reasons behind a deferential approach to last chance agreements and for the over-arching human rights obligations at play, an arbitrator's role in the face of a relapse prevention agreement remains to determine herself whether a grievor has been accommodated to the point of undue hardship, which is the next question to be addressed.

Has the Point of Undue Hardship Been Reached?

22. Each case will turn on its facts. There are three preliminary comments to be made about the facts in this case.

23. First, I do not consider it significant that the biological monitoring test scheduled on March 18, 2022 did not occur. I accept that the Company was allowed to rely on the Grievor's own information that he relapsed, as evidence the Agreement had been breached. Biological monitoring was not required to "confirm" that admission. Such evidence would be redundant. Second, I accept that an arbitrator can review post-termination evidence of rehabilitation, as that evidence may be relevant to assessing claims of significant gain towards conquering an addiction. This is relevant to potentially substituting a penalty other than discharge: **CROA 3415** Third, I cannot agree with the Union that the situation before me should be considered as a "first" relapse – and

therefore distinguishable from cases involving multiple relapses - because it is the "first" to occur *under a relapse agreement*.

24. A "relapse" for an individual suffering from substance abuse is not defined by whether that individual is or is not employed or is or is not subject to a relapse prevention agreement. Rather, a "relapse" refers to "not being able to stay drug-free or sober over time"[1]. I have determined this case involved multiple relapses and that it is the consequences for a *third* relapse that is now under grievance:

a. The Company first accommodated the Grievor due to his substance dependency in early 2013. I accept that at that point in time, the Grievor had a substance abuse disorder which the Company began to accommodate. Also at that point, the Grievor would be expected to be working to overcome his addictions;

b. The Grievor's accommodation into the Track Maintainer position would be the Grievor's first opportunity to understand the impact of his addiction on his employment and the Company's first accommodation effort;

c. In August of 2013, the Grievor entered into a treatment agreement with the Company, which provided he could be withheld from service if he did not comply with its requirements. That was his second opportunity that he must work to overcome his addiction to remain employed and the Company's second attempt to accommodate the Grievor's addiction;

d. There followed a five year period without incident.

e. In 2018 the first "relapse" occurred;

f. A third effort to provide the Grievor an opportunity to remain employed while battling his addiction was provided by the relapse agreement entered into in May of 2018;

g. A second "relapse" then occurred *prior to* the execution of the December 22, 2021 Agreement, 2.5 years later; that Agreement was the Grievor's *fourth* opportunity to demonstrate to the Company he had a commitment to his sobriety;

[1] Government of Alberta; "Planning for Alcohol or Drug Relapse"; https://myhealth.alberta.ca/Health/Pages/conditions.aspx?hwid=ug4863

h. A further – *third* - relapse occurred in March of 2022 - just 2.5 *months* after execution of the Agreement.

25. The Union's has requested a "fifth" opportunity for the Grievor to remain employed while he works at gaining control of his addiction.

26. As was conceded, the Grievor breached the Agreement by relapsing and by using prohibited substances in March of 2022, in violation of Article 1. It is an important – and key – feature that the Agreement in this case is a *tri-partite* agreement. The Grievor had the assistance of the Union in determining whether to enter into such an agreement and his interests were appropriately represented – and protected - by the Union. As noted in **CROA 3198,** the other alternative for the Grievor was to reject those terms, grieve his dismissal, and wait to have that grievance arbitrated. The choice he made allowed him to continue receiving the significant benefits of remaining employed while he battled his addiction, unfortunately unsuccessfully. That Agreement provided the Company would have the sole discretion to decide to terminate the Grievor for the next relapse.

27. Reviewing these facts, at first, the accommodations provided by the Company seemed successful, and the Grievor had almost five years incident free between 2013 and 2018. However, I find it relevant to consider that with each successive "last chance" given, the Grievor's relapses occurred closer together. In my view, this evidence is opposite to that which would demonstrate the Grievor was "winning the battle" against his addiction, despite expected setbacks. Rather, it is evidence that the "last chance" agreements were <u>not</u> having the desired effect of galvanizing the Grievor to gain control of his long-standing and deep-seated addiction.

28. Further relevant considerations regarding determining “undue hardship” are the nature of the Grievor’s job as safety sensitive (**CROA 4700**, p.16; **CROA 3198**), combined with the Grievor’s negative attitude and lack of insight into his condition as late as the Fall of 2021, eight years after he was first accommodated. I cannot agree the Grievor’s self-disclosure acts to his credit. The timing of his contact – and the questions he asked – support a conclusion that the Grievor was not having a “crisis of conscience” in March of 2022, but rather he was weighing what would be the best situation for himself between self-disclosing a relapse that had occurred thirteen (13) days before, and failing the biological monitoring test scheduled for the next day, in view of that relapse. This circumstance does not work to the advantage of the Grievor or provide any comfort to the Company that further relapses would be reported in a timely manner.

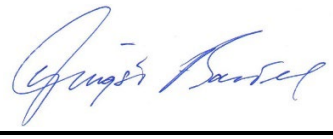
29. The Grievor had eight years to fight the battle against his substance addiction, without losing his employment, but he was not able to do so. After his breach, the Company determined the Grievor’s disorder was “severe”; his issues complex; and his prognosis poor. For the reasons noted above, I am drawn to the conclusion the Company has met its obligations to this Grievor and that it would be an undue hardship on the Company to interfere with the penalty of dismissal and return the Grievor back to work. While the Grievor’s rehabilitation efforts post-termination are to be encouraged, and it is hoped he can maintain his sobriety, I am unable to accept that these efforts change this result, on the facts of this case. Rather, I find it would constitute undue hardship for the Company to provide to the Grievor a fifth opportunity to remain employed while he battles for sobriety.

30. There is an end to tolerance and it has been reached in this case. In view of this result, it is not necessary to determine if the Grievor also breached the agreement by failing to “immediately” report his relapse.

Conclusion

31. The Company has satisfied its obligation to accommodate the Grievor to the point of undue hardship. The Grievance is dismissed.

July 5, 2023



CHERYL YINGST BARTEL

ARBITRATOR