CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4865

Heard in Edmonton, September 14, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor P. Murray of Calgary, AB.

JOINT STATEMENT OF ISSUE:

Following an investigation Ms. Murray was dismissed for the following:
"In connection with your tour of duty on November 10, 2021, while working as the Foreman on CW11-10 and your unauthorized departure from Company property and failure to participate in a post-incident substance test as requested by the Company a violation of the following:

- CP's Alcohol and Drug Policy HR 203
- CP Procedure HR 203.1
- Rule Book for T&E Employees, Section 2 – General, Item 2.1 Reporting for Duty
- Rule Book for T&E Employees, Section 2 – General, Item 2.2 While on Duty
- T&E Availability Standards Canada (INFO-AB-216-21, dated Oct 4, 2021)"

Union's Position

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above.

The Company has failed to consider mitigating factors as presented on the record.

The Union contends the discipline assessed is discriminatory, unjustified, unwarranted, arbitrary, and excessive in all of the circumstances. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union contends the Company had no cause for testing, that the requirement to submit to testing was in violation of the Company's own policy HR 203.1, and that the alleged efficiency test fail did not rise to the level of a significant work related incident.

The Union contends the Company failed to accommodate Ms. Murray, a violation of Article 36, applicable Company policies, and the Canadian Human Rights Act.

The Union requests that Ms. Murray be reinstated without loss of seniority and benefits, and that she be made whole for all lost earnings with interest. The Union also seeks damages, in an amount to be determined, resulting from the aforementioned violations. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees and denies the Union's request.

The Company maintains that discipline was assessed following a fair and impartial investigation and a review of all pertinent and available factors, including those described by the Union. The discipline assessed was in line with the Company's Hybrid Discipline & Accountability Guidelines and the principles of progressive discipline.

The Company submits it complied with all relevant policies and procedures, and met the burden of proof required to sustain the discipline assessed. The Company maintains that the Grievor was properly subject to post incident testing following an incident. After being advised she would be post incident tested, the Grievor left Company property without authorization. Consequently, the Company was not able to perform post-incident testing within the required timelines, resulting in a violation of the policy.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) L. McGinley**
General Chair	Manager Labour Relations

There appeared on behalf of the Company:

A. Cake	– Manager Labour Relations, Calgary
S. Scott	– Manager Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– Gen Chair CTY W, Calgary
D. Edwards	– Vice Gen Chair, CTY W, Calgary
J. Hnatiuk	– Senior Vice GC, Calgary
P. Murray	– Grievor, Calgary

AWARD OF THE ARBITRATOR

Background and Issues

[1] The Grievor was dismissed when she left work after an incident and failed to participate in the Company's request for a post-incident drug test. She was also assessed a 20 day suspension for the underlying incident, which is not under grievance in this proceeding.

[2] There are four issues to be resolved:

a. Whether the Company had cause to test the Grievor;

b. Whether the Investigation was conducted in a fair and impartial manner;

c. Whether the Company had a duty to accommodate the Grievor; and

d. If not, whether the Company had cause to dismiss the Grievor for her unauthorized departure from work and her refusal to test and if not, what other discipline should be substituted.

[3] For the reasons which follow, the answers to those questions are “yes”, “yes” “no” and “yes”. The Grievance is dismissed.

Facts

[4] On November 10, 2021, the Grievor was working as a Conductor/Yard Service Employee in Calgary. She had eighteen (18) years of service. This position is considered to be “safety-critical” and the industry highly safety-sensitive.

[5] On this day, the Grievor was acting as Foreman. The Grievor’s duties required her to operate a Remote Control Locomotive Service Unit (RCLS). The RCLS unit allowed her to operate a locomotive from the ground, by way of a beltpack attached to her vest.

[6] The discipline for misconduct which occurred next is not before this Arbitrator. However, it is necessary to make certain findings of fact relating to that incident for context, as it is relevant to an assessment of whether reasonable grounds existed for the post-incident test. There were two videos which were of some assistance and memos from both the Assistant Superintendent (“A/S”) and the Superintendent. The A/S also observed the incident.

[7] Around 8:30 a.m., the Grievor was attempting to make a joint between two cars. The joint was unsuccessful using the beltpack and the cars did not couple together, as the knuckles were not aligned. It was necessary for the Grievor to “stretch” the movement by moving the rail cars by one length westward. I accept that as a result of that movement, the railway equipment adjusted slack eastward by ½ of a car. This meant there was approximately ½ of a car length of room between the equipment. During the process of the slack adjusting, the Grievor leaned in toward the equipment and then stepped back quickly as the slack adjusted. After the

movement stopped, the Grievor also stepped from the south side of the equipment to the north side. To do so, she stepped between the equipment.

[8] The Memo of the A/S states that he asked the Superintendent – who was standing beside him – to confirm whether the distance between the cars – where the Grievor had just crossed – was 50 feet. The Superintendent confirmed that the distance between the equipment was approximately ½ a car length "at best" (or 25 feet). The A/S advised the Superintendent of the actions of the Grievor and was then instructed to bring her to the office for testing.

[9] From a review of all evidence, I accept the amount of separation was approximately ½ of a car length or 25 feet. I am satisfied the Grievor's body was where it was not supposed to be when the slack was adjusting, and that her need to "pull back quickly" resulted. I accept that it is more likely than not that her torso did "cross the plane". I also accept this was a safety rule violation. Further, it is undisputed the Grievor also physically crossed between the equipment from the south to the north side, after the train was stopped when there was ½ car of separation. This was a second violation of the same rule, in a short period of time.

[10] The Grievor was immediately contacted by radio and was called into the General Yard Office to discuss this incident. There she met with the A/S and the Superintendent. The Trainmaster was also in the office. I accept that the Grievor's demeanour when she was called into this meeting was "casual". I accept she was slouched in the chair and that there was a discussion of the incident and a review of two different camera angles with her. The Grievor explained that she thought she had 50 feet between the cars. She was told there were two camera angles and that both the A/S and the Superintendent looked at the car and it definitely was not a car length.

[11] The Grievor was then told by the A/S that she would be required to submit to a drug and alcohol test. She asked what this meant and was told she would need to submit to a "pee test". I find the Grievor's demeanour changed after she received that information. I find she became "slightly agitated, quickly sat up straighter" and asked

to talk to her Union rep. The conclusion of the Superintendent, which I share, was she became upset at being required to submit to drug testing.

[12] The Grievor then asked the Company officers for a moment to herself which was granted, and she stepped out of the room. Unknown to the Company officers, when the Grievor left the room, she also proceeded to leave the building, get into her vehicle and drive away.

[13] I am satisfied these actions were confirmed by camera footage, which showed the Grievor driving away at 9:02 a.m. After giving the Grievor five or six minutes, the Company officers checked outside of the room but could not find her. They conducted a search of the property but could not locate her around the property either. They then checked the camera footage and saw she had left.

[14] The Company attempted to contact the Grievor by phone call and text message but the Grievor did not respond.

[15] Immediately after the Incident, the Grievor went on medical leave. She was cleared to return to work on February 23, 2022, almost three months after the Incident. The medical information provided by the Grievor's doctor indicated she attended at her doctor's office on November 10, 2021 because she was "stressed and overwhelmed". He diagnosed her with an "Acute Reaction to Stress" and an "Emotional Breakdown" on that day, and initially prescribed rest and then some counselling. The doctor's initial Report to the Company dated November 10, 2021 indicated the Grievor was "under a lot of stress which was triggered by home and work stressors". She was expected to be off work for two weeks. A subsequent short description was provided on February 2, 2022, which also described her response as an "acute reaction to constant stress". The Grievor's time off work was extended to mid-January 2023 on the Functional Abilities Form, which was filled out by her doctor one week later, on November 18, 2021.

[16] Shortly after her return to the workplace in 2023, the Grievor was Investigated for both the alleged track misconduct (the "track" investigation) and the alleged post-

incident violation of leaving without submitting to a post-incident test (the "test" investigation). These two Investigations took place consecutively on the same day, March 3, 2022.

[17] In the latter Investigation, the Grievor provided two substance test results to the Company from DriverCheck. Those tests were privately arranged by the Grievor and were conducted on November 12, 2021, which was two days after the incident. The tests were urinalysis and breath for alcohol and were "negative". Her evidence was she tried to have the tests the day she left but two days later was the soonest they could get her in.

[18] The Grievor was ultimately assessed a 20 day suspension for her conduct in not maintaining a 50 ft separation between railway equipment – both when she placed her body between the cars initially as the train was adjusting slack and also when she stepped between the cars after the equipment came to a stop.

[19] As noted in the JSI, she was dismissed for her unauthorized departure from Company property and her failure to participate in a post-incident test when unauthorized to do so. It is that dismissal that has been grieved in this process.

[20] Section 2 of Policy HR203 (Alcohol and Drug Policy) states that employees will be subject to workplace alcohol and/or drug testing, as outlined in the Procedure (HR203.1). Section 3 states that disciplinary action "up to and including dismissal will be taken where CP has determined that violations of the Policy and Procedures have occurred". Section 4.0 of the Procedure states it is a violation of the Policy to fail/refuse to test.

Arguments

[21] The Company argued its Alcohol and Drug Procedures (Policy HR 203.1) (the "Policy") provided for testing after a "significant work-related incident"; a "safety related incident" or a "near miss" which was a reasonable requirement consistent with the law; the Grievor's actions were the contributor to this incident; she created a risk of serious injuries; lack of maintaining adequate separation had caused death in this industry before; and that it therefore had cause to test the Grievor for

substances after this incident. It argued its discipline was fair and reasonable as the violation was very serious; the Company considered it a "Major-Life Threatening" violation under its Hybrid Discipline & Accountability Guidelines; and this rule violation created a significant risk of injury.

[22] The Company noted the Grievor was subject to post incident testing two years before this incident, which was completed without issue and that there was nothing different about this testing. It argued there was no causal connection between the Grievor's medical information and her unauthorized departure and refusal to be tested; that she was aware she had to stay to be tested; that leaving violated the "work now, grieve later" principle and that there was no basis or information to support any duty to accommodate as there was no causal connection between the Grievor's refusal to stay for testing and unauthorized departure and her medical condition.

[23] The Union argued cause was not established for the testing in this case. It argued this was not a significant incident as the equipment was stationary at the time and the Grievor was not in danger when she crossed over in front of it; that testing was highly intrusive and was not grounded in the Company's Policy; that testing was automatic instead of specific to these circumstances; and that the request was contrary to the Company's own Policy. It also argued the Company did not have cause to test the Grievor in the context of an efficiency test for Rule T-20. It argued the Company did not suggest the Grievor was impaired on November 10, 2021 and that it has not drawn that inference.

[24] The Union also argued the Investigation was not conducted in a fair and reasonable manner as the Grievor was asked self-incriminating and speculative questions on four occasions and was pressed repeatedly on the nature of her medical condition; that she was misled when told she was told she had to stay with Company officials; and that this was a "for cause" test which was unreasonable as there was no evidence of signs of unfitness. It also urged the Company did not appropriately consider the results of the Grievor's own testing, which was unreasonable. The

Union argued the Company had no basis to remove the Grievor from service before the test was undertaken, under the terms of the Policy.

[25] The Union argued the Grievor had suffered a profound and acute stress reaction which should bear "mitigating application of the Company's statutory duty to accommodate to the point of undue hardship", which resulted from her manager's premature refusal to remove her from work. It argued it had satisfied its burden to establish *prima facie* discrimination. It objected to any adverse inference being drawn by the Company.

Analysis and Decision

Was it Reasonable to Test the Grievor?

[26] The first question is whether it was reasonable to substance test the Grievor. If it was not, any discipline which flowed *from that test result or refusal* would be void.

[27] It must be emphasized that would not impact the discipline which flowed from the alleged culpable acts. The Grievor was assessed a 20 day suspension for that misconduct, which is not before the Arbitrator. The only issues noted in the JSI are the Grievor's dismissal for leaving work and her failure to participate in the post-incident testing.

[28] Substance testing in Canadian workplaces is only allowed in certain, limited situations. It is acknowledged it is a stressful experience for many people and it is considered by the Courts to be highly intrusive. However, the stressful nature of that testing does not forgive individuals from the requirement that it be undertaken, in appropriate circumstances.[1]

[29] As noted by the Supreme Court of Canada in *Irving,* if an employee was directly involved in a "workplace accident" or "significant incident" that is a basis for

[1] See discussion of the four situations in **CROA 4836** (at para. 37); relying on *CEP, Local 30 v. Irving Pulp & Paper* 2013 SCC 34, para. 30.

substance testing.[2] This is known as “post-incident” testing. It is a form of “for cause” testing, with the “cause” being the incident occurring.

[30] As noted in *Saskatchewan Health Authority v. HSAS*[3], an employer is “entitled to insist that an employee take an immediate test for alcohol or drug use where there are reasonable grounds for the test”. It was noted in **AH732** that the Company’s Alcohol and Drug Policy and Procedures; HR 203 and HR 203.1 (currently under grievance) were “alive” to the principles noted in *Saskatchewan Health*.

[31] It is well-recognized in the jurisprudence that arbitrators are to apply the “balancing of interests” approach between the two competing interests in determining the existence of “reasonable grounds” and that “reasonable” is an “inherently elastic measure”.[4] That said, it appears easier to state what does “not” qualify for post-incident testing than what does, which was noted recently in **CROA 4841**.

[32] Summarizing the applicable principles, I am prepared to find:

a. An incident must have some significant potential for injury before it can support substance testing. Not every incident will meet this threshold;

b. The decision to test cannot be a “mechanical” response (the “checking of a box”); discretion must be exercised; and

c. There must be a “link” between the incident and the conduct of the Grievor.

[33] Evidence is generally required to establish these factors, although the seriousness of some incidents and the significant potential for injury may be self-evident.

[34] Applying those principles to this case, this Grievance involves two separate issues of culpability: a) The Grievor’s body positioning while the train was moving and the slack was adjusting, and b) her crossing the tracks after the train stopped, both of which I find occurred without 50 feet of separation. Both culpable acts are serious allegations of the same sort: failing to maintain proper space between railway

[2] At para. 30
[3] 2020 CanLII 25719; at para. 48 referring to para. 38; see also para. 68 for listing of the considerations for post-incident testing
[4] As noted at para. 45

equipment. I accept that not maintaining appropriate distance carries a significant potential for injury in this industry, which is a situation which has been realized in the past. It is a rule established to maintain safe work practices for employees. The threshold for the "significance" of this incident has been met. It is not difficult to establish the "link" in this case, as the Grievor is the only individual involved in this incident.

[35] I find that the decision to test the Grievor was not made "mechanically", but that discretion was exercised by senior management officials before that decision. This was not a case where the railcar was "close" to 50 ft. such that the Grievor's judgment call was "close". I accept there was only ½ a rail car between equipment. The A/S called the Superintendent to confirm that he saw the same lack of separation. Those two senior officials discussed what the A/S actually saw. I accept it was perplexing for both men how an eighteen (18) year veteran could be confused between ½ car length and one car length for not just one, but two actions in a short amount of time. The A/S noted that he saw both actions. The A/S and the Superintendent also heard the Grievor's explanation before advising her she would be tested. She was given an opportunity to explain what was inexplicable. It must be recalled the Grievor's only explanation was that she thought she had separation. It is inexplicable how she could have thought that, when her evidence at the Investigation confirmed her understanding at the time that she had stretched the train westward one car and that the slack had adjusted eastward ½ a car. That results in a net ½ of a car of separation.

[36] I do not find credible that the Grievor was experiencing any type of intimidation from meeting with these three men or that she started to be uncomfortable from their presence, and so couldn't recall that much of the meeting as was argued by the Union and had to leave. I do not find her evidence credible. I also do not find credible her evidence that she didn't recall being told about the drug test or being told to wait for the collector.

[37] I accept it was only when she realized she would be substance-tested that her demeanour changed and she decided to leave.

[38] While the Union has argued the Company has not drawn an adverse inference from the Grievor's actions and it would be inappropriate to do so, it is not only the Company that has the ability to draw adverse inferences. It is the role of an arbitrator to find facts and draw inferences from the evidence, in resolving disputes. The fact the Company did not do so does not prevent an arbitrator from doing so, in appropriate cases. In this case, the Grievor's demeanour changed when she was told she would be drug tested. She took advantage of the Company's good faith in allowing her to step out of the office. Instead of gathering her thoughts as she said she wanted to do, she left the building and the property.

[39] The only reasonable inference that is available to be drawn on a review of all of the evidence is that she felt that if she tested, it would be positive.

[40] This leads to the next question, which is the whether the Investigation was fair and impartial.

Was the Investigation Fair and Impartial?

[41] The Investigation is an important process for both parties and for the arbitrator. It is an to be an evidence-based process and is to take the place of an arbitrator's fact-finding. Not all of that evidence may be favourable to a Grievor.

[42] I have reviewed the transcript of the Investigation. The evidence was not unfair or partial because the Grievor was asked questions, the answers of which could incriminate her. Had oral evidence been given by her in this process, the same could be the case. Neither was the Grievor badgered for information about her illness that the Company was not entitled to, as argued. She could determine whether she did or did not want to share any details of her medical condition when asked about a reasonable explanation for leaving the property. For example, she indicated she did not wish to provide any details when asked whether if it was "unusual" for her to be made uncomfortable with men, which was her explanation

for her agitation in the room, and which she tied to her medical condition and that was respected.

[43] It should be noted there was no connection made in the medical documentation of any such connection.

[44] I am satisfied the Investigation was fair and impartial.

The Impact of the Grievor Leaving Work Prior to Testing

[45] It is not enough to state a connection between a medical condition and behaviour. The burden is on the union to establish that *prima facie* discrimination has occurred due to a disability. To do so, they must establish the Grievor's medical condition impacted her ability to comply with the Company's requirement to be tested.

[46] I accept the Grievor's evidence was that she arrived at work on November 10, 2021 fit and rested and ready for duty. None of the "life stressors" which she mentioned to her doctor later that day impacted her ability to perform her safety critical and dangerous work that day, at least prior to her finding out she would be substance-tested. She was coping with the pressures of life and carrying out her employment duties, as most employees do. I find it was only when she was advised she would be tested that she began to be uncomfortable and left.

[47] There was no evidence the Grievor raised any type of medical condition to the Company or sought to be accommodated due to disability *prior to* November 10, 2021.

[48] The Union argued the negative test result two days later was "some evidence" to be considered. I cannot agree. It does not take an expert to understand that drugs metabolize over time in the body and that the body may not be in the same condition two days later, or test in the same way. A test taken on November 12, 2021 does not establish the Grievor would have tested negative on November 10, 2021 or provide any relevant evidence in her favour from its negative result.

[49] I accept that substance use testing is a stressful situation for any employee and can cause an individual to feel overwhelmed and "stressed", as it did for this Grievor. However, I am unable to agree when considering all of the facts of this case that the Grievor was so overwhelmed from a medical disability that she could not function and so could not stay at work even a short time to submit to same-day drug testing, or that she could not ask to leave due to illness *after* that testing occurred. The evidence simply does not exist to support that conclusion I am led to the conclusion no evidence of any causal factor exists between the Grievor's disability and her inability to stay at work to be tested.

[50] The Grievor had functional ability to drive herself from the Company's workplace. She also indicated in her evidence she was trying to get tested the same day but they weren't able to see her. She had the functional ability to make these inquiries. More importantly, this evidence demonstrates she had the medical *capacity* to submit to substance testing *on November 10, 2021* and was not prevented by a disability from undergoing that testing on that day. It is evidence there is no connection between her ability to be tested and her disability.

[51] The Union has therefor not met its burden to establish that *prima facie* discrimination against the Grievor. Therefore, a disciplinary analysis must be applied, rather than that of accommodation. That analysis is outlined in *Re Wm. Scott & Co.*[5]

Question 1: Was Cause Established for Some Discipline?

[52] The first question under a *Re Wm. Scott & Co.* analysis is whether the Company had cause to discipline the Grievor.

[53] The Grievor was not dismissed for her misconduct on the "track" in this case or for an efficiency failure, as argued by the Union. Rather, she was dismissed because she refused to submit to a post-incident test and she left work when she was not

[5] [1978] B.C.L.R.B.D. 98

authorized to do so, in what I am satisfied was an attempt to avoid taking that substance test. Both instances are culpable conduct and would attract discipline.

[54] If the Grievor disagreed with the Company's decision, she was to "work now; grieve later" and trust her Union to represent her interests, as it has admirably done in this case.

[55] Regarding the refusal to submit to testing, I am satisfied this is an appropriate case, on all of the evidence, to draw an inference that the reason the Grievor fled was because she feared her result would be positive. This is not a finding that the Grievor was impaired, which argument the Union has argued the Company has not made. Rather, this is an inference that one of her test results may have been positive. Due to her actions, it is not possible to determine what that result might have shown. I am satisfied that was the intended result of the Grievor's actions.

[56] I have no difficulty in determining the Grievor gave the Company some cause for discipline for these two actions.

Question 2: Was Discharge a Reasonable Result?

[57] The next question is whether the Company's response of dismissal was a just and reasonable one. Precedents are of limited assistance to this question, as it is factually driven. The nature of the offence is an important factor that must be considered.

[58] Leaving work without authorization is a serious offence. Leaving work surreptitiously when not authorized to do so – in an attempt to avoid an unfavourable substance test – are together serious and significant offences. I am satisfied these offences when considered together would attract significant discipline. The Grievor's failure to answer the Company's texts or phone messages after she left is also an aggravating factor for discipline. Had here been some type of emergency situation in which the Company was not able to access cameras, the Company would have rightly considered it was accountable for the Grievor's whereabouts, not knowing she had left.

[59] The Grievor is a long-serving employee. The Grievor's discipline record prior to 2015 was poor. Since that time, she has a 30 day suspension; and the 20 day suspension imposed for this misconduct, which is 50 days of suspension. Her record is not particularly mitigating. I do not find the Grievor was provoked or intimidated because the room where she met had three men, or it was that which made her uncomfortable. I have not found that evidence to be credible, along with several other aspects of the evidence given in her Investigation. Her lack of credibility impacts consideration of her remorse and her ability to accept responsibility.

[60] The Grievor's actions are very concerning. A strong message must be sent that leaving work when unauthorized to avoid a potential positive substance test will be met with serious and significant discipline. The "work now; grieve later" principle, which is fundamental to labour relations, must be respected.

[61] After considering all of the facts and circumstances of this case, the Company's response was in a reasonable range of possible outcomes for what was significant and serious misconduct. I do not consider this is a situation which would attract my discretion to disturb that decision.

Conclusion

[62] The Grievance is dismissed. The discharge is upheld.

[63] I retain jurisdiction to address any issues with the implementation of this Award, and to correct any errors or omissions to give it the intended effect.

December 12, 2023

CHERYL YINGST BARTEL
ARBITRATOR