CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5105

Heard in Edmonton, November 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Lunar of Edmonton, Alberta.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Lunar was dismissed on January 13, 2023, for the following: "For failing disclose prior medical information during your Pre-Employment Medical completed on March 15, 2018 and your Reinstatement Medical Assessment completed on December 17, 2021. A violation of Canadian Pacific Policy OHS 4000 - Fitness to Work Medical Policy (Canada Only) & Procedure - Fitness to Work Medical Procedure (Canada Only)."

The Company failed to respond to the Union's Step One and Two appeals.

Union Position

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union contends the Company's failures to respond to the Step One and Two appeals is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. For these reasons, the Union contends that the discipline is *void ab initio* and ought to be removed in its entirety and Mr. Lunar be made whole.

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

The Union contends the discipline assessed is excessive in all the circumstances, including mitigating factors evident in these matters.

The Union submits the discipline assessed is arbitrary, unjustified, unwarranted, and excessive assessment of discipline. The Union further contends the discipline does not conform with the principles of progressive discipline.

The Union asserts the Hybrid Discipline & Accountability policy violates the Collective Agreement and other provisions for reasons previously provided and disputes its application in the instant matter.

The Union seeks an order that the Company has violated the above-cited Collective Agreement articles, policies, and legislation. The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with the same.

The Union requests that the discipline be removed in its entirety, and that Mr. Lunar be reinstated without loss of seniority and benefits and be made whole for all associated loss with interest. The Union also requests Mr. Lunar be awarded suitable damages to be determined. 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 the Grievors culpability as outlined in the discipline letter was established through a fair and impartial investigation. Discipline was determined following a review of all the pertinent factors.

In regards to the Union's contentions concerning the grievance responses, the consolidated collective agreement article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges article 40.04 and has progressed to the next step of the grievance procedure.

The Company's position continues to be that the dismissal was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and respectfully requests the Arbitrator be drawn to the same conclusion.

For the Union:	**For the Company:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chairman CTY-W	Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary
A. Birdsell	– Manager, Health Services, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Edmonton
J. Hnatiuk	– Vice General Chair, Calgary
W. Chernoff	– Local Chair, Edmonton
S. Lunar	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

[1] The Union raised a preliminary issue requesting anonymization of this decision. The Company opposed that position. The Union raised the same issue for two other cases heard at the November 2024 Session.

[2] In order to properly consider this issue, the Arbitrator directed the parties to provide additional short submissions on the application of the test of the Supreme Court of Canada in *Sherman Estate v. Donovan et al.* 2021 SCC 25 (CanLII), as that case had not been relied upon by either party at the hearing. The Arbitrator also requested the parties

provide any other jurisprudence at CROA dealing with contested applications on this issue. Those submissions were provided after the CROA hearing session, as requested.

[3] The cases relied on by the parties are: **CROA 4877-A** (in translation); **CROA 4270** and **CROA 4679**, as well as *Sherman Estate***.**

[4] In the meantime, the merits were heard at the November CROA session, as scheduled, with the issue of anonymization to be decided on a preliminary basis.

Preliminary Issue: Anonymization

[5] The Supreme Court of Canada has recognized that "court openness" is presumptive. In 2021, it developed a three part test in *Sherman Estate*. **CROA 4270** and **CROA 4679** were decided before that test was developed, which makes those cases distinguishable.

[6] The burden is on the Union to establish that this three part test has been met, before an application for anonymization will be granted.

[7] The applicable test is:

a. Court openness poses a serious risk to an important public interest;

b. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c. As a matter of proportionality, the benefits of the order outweigh its negative effects (at para 38)

[8] An analysis of this test, and the interests it seeks to balance, were canvassed in **CROA 4877-A** and need not be repeated here.

[9] The Union argued all three parts of the test had been met in this case. It argued the specifics of certain medical condition(s) of the Grievor should be anonymized as going to this Grievor's "biographical core". It maintained disclosure of the Grievor's medical conditions would affront this Grievor's dignity and that anonymization was a reasonable and appropriate measure. It argued that part two of the test was met, as without anonymization, the Grievor's, identity and health conditions – which were previously private – would become public information. It further argued part three is met, as if

anonymization is allowed, there would be significant benefit to the protection of privacy, and the underlying facts of the grievance, the argument of the parties, and the reasoning behind the decision would all continue to be public. It argued the Grievor's underlying medical condition "is in no way related to the merits of the case"; that the Office has in the past allowed anonymization at the Union's request and over the Company's objection in CROA cases **4270**; **4679** and most recently in **4877,** the rationale of which it adopted; and the Company has no legitimate interests in specifically naming the Grievor and did not object to anonymization for several months, until "mere weeks" before the hearing.

[10] The Company argued that the Supreme Court has recognized that the open court principle is protected by the "constitutionally entrenched right" of freedom of expression; and that there is a strong presumption in favour of open courts, which it recognized as an important public interest (at paras 1-2). It argued that a party seeking restriction of this principle carries the burden to establish that the openness presents a "serious risk to a competing important public interest" and that the Union has not met this burden. It argued that the exception for striking at an individual's "biographical core" is a narrow one. It further argued protection from disclosure of specifics could be achieved for this Award by a reference to a "medical condition". As such, there was no need to anonymize to protect that information.

[11] Turning to the resolution of this issue, neither **CROA 4270** nor **CROA 4769** are helpful. The Supreme Court of Canada's test in *Sherman Estate* post-dates both of those decisions.

[12] As stated in **CROA 5109**, as a starting principle, a judicial or quasi-judicial decision-maker should always seek to limit references to sensitive medical information, by referring only to the level of information required to resolve a particular dispute. There is a responsibility that accompanies knowledge of sensitive medical information.

[13] Considering first the Grievor's medical condition, as in **CROA 5109**, it is unnecessary to address whether the first branch of the test has been met, as the second branch of the test has not.

[14] Unlike in **CROA 4877-A**, and as in **CROA 5109**, the specifics of the Grievor's medical condition(s) are not central to resolving this dispute - as noted by the Union in its

argument. As such, a carefully written Award which refers only to the Grievor's "medical condition(s)" and "symptoms" which can be neutralized by reference to "X", is a reasonable alternative to anonymization. As such, there is no offence of the open Court principle, given there is no important public interest that cannot be protected by alternative measures. The presumption of open Court proceedings – or open quasi-judicial proceedings – has not been displaced.

Analysis and Decision on the Merits

Issues and Summary

[15] The issues between the parties are:

a. Was the Investigation fair and impartial? If so,
b. Was the Grievor culpable for failing to disclose as alleged? If so,
c. What is the impact of that culpability on the Grievor's position given the terms of the Reinstatement Agreement?

[16] For the reasons which follow:

a. The Investigation was not unfair nor impartially conducted;
b. The Grievor is culpable for failure to disclose the symptoms experienced in the Fall of 2021. As such, his Reinstatement Agreement placed him into a dismissed state
c. Even were that not the case, given the existence of the Reinstatement Agreement and the Grievor's precarious employment situation, dismissal would have been a just and reasonable response under a *Re Wm. Scott* framework analysis.

[17] The Grievance is dismissed.

Analysis

[18] The Grievor was hired on April 2, 2018. He qualified as a Conductor on November 29, 2021 and worked out of Edmonton. He had approximately two years of active service when he was assessed 10 demerits for failing to ensure a switch was properly lined, resulting in a run-through. He was subsequently tested for drugs and alcohol and dismissed on August 16, for his positive test result.

[19] On December 3, 2021 the Grievor was offered reinstatement by the Company on certain conditions, which he accepted (the "Reinstatement Agreement').

[20] One of the conditions in that Agreement was that the Grievor undergo a medical assessment for his position, a Substance Abuse Professional Assessment and any other medical assessments deemed necessary by the Company. As noted by the Company, "[b]efore returning to service, the Grievor had to be cleared and determined to be medically fit for their regular position of Conductor buy the office of the Chief Medical Officer, or his designate" (at para. 6). That Agreement also provided that if the Grievor failed it comply with its conditions or requirements, the Agreement would be void and the Grievor would revert to a dismissed status.

[21] Due to the requirements of certain medical conditions, the Grievor was not anticipated to return to work until late in 2022.

[22] In complying with that Agreement, the Company came into possession of the Grievor's medical information. That medical information included references to medical conditions and/or symptoms which it argued the Grievor should have disclosed on the pre-employment medical assessment in March of 2018 and on his medical reassessment questionnaire on December 17, 2021, but which were not so disclosed by the Grievor.

[23] The Grievor was dismissed on January 13, 2023 for:

> Failing to disclose prior medical information during your Pre-Employment Medical completed on March 15, 2018 and his Reinstatement Medical Assessment, completed on December 17, 2021. A violation of Canadian Pacific Policy OHS 4000-Fitness to Work Medical Policy (Canada Only) & Procedure – Fitness to Work Medical Procedure (Canada Only).

[24] The Union argued the Investigation was not fair or impartial. It also argued no culpability had been established in these circumstances, as the Company had failed to specify what portions of the policies were allegedly violated; that Health Services did not order any medical examinations or reports to establish any diagnosis of a medical condition that it was alleged required reporting; that only certain symptoms were discussed by the Grievor at the Investigation; and that no medical condition was in fact diagnosed. It also pointed out the physician of the Grievor had deemed the Grievor was "fit for duty". It noted the Grievor had not been "diagnosed" with a medical condition causing the disputed symptoms, but had only self-reported those symptoms as a child; that no medical diagnosis was ever made; that the Grievor's physician had never

observed these symptoms; and that discipline was excessive, given the issue is “one or two undiagnosed events from 25 years prior in his life” so dismissal was too severe. It also noted the Grievor was forthright even about conditions that resulted in an unpaid absence from work for more than a year and there was no intention to deceive. It argued **CROA 3619** was analogous to these circumstances.

[25] The Company argued that cause was established and discipline assessed as the result of a fair and impartial investigation. It argued the Grievor’s dismissal was the appropriate outcome for the Grievor’s failure to answer the Company’s question appropriately. It pointed out the Grievor occupied a safety-critical position, in a highly safety-sensitive profession, and worked largely unsupervised; that certain medical conditions and symptoms could result in an employee’s removal from work; that Section 4.2 of the Fitness to Work Procedure required the Grievor to disclose any condition that may affect an ability to work safely; and that Section 5 states that discipline up to dismissal could follow. The Company also pointed out it was bound by the *Canadian Railway Medical Rules Handbook* regarding fitness for duty and that the Company – and the Grievor’s doctor – had to assess if the Grievor was fit for duty. It argued that correct and truthful medical information from employees is vital. It agued these were *bona fide* requirements of holding a safety-critical position in this industry. The Company maintained the core function of a Conductor was to work around “live track” and operating trains, with work rotations that could result in disturbed sleep patterns; and that these employees worked largely unsupervised. The Company relied on **SHP 278** and **SHP 718** as support for its discipline choice. It argued the Grievor was in violation of those procedures when there was failure to truthfully disclose certain medical symptoms issues in both the pre-employment medical in 2018 and the 2021 reinstatement medical. It pointed out that the questions at issue specifically asked for the type of information which the Grievor failed to disclose, and that the Grievor had experienced those symptoms more recently than just as a child. The Company also argued that the Investigation was fair and impartial.

Decision

[26] The Union did not provide any details for its argument of an unfair and impartial investigation in its argument. That argument not being supported by any facts, it will not be addressed.

[27] The Union also presented arguments regarding the Company's lack of response to its Grievance, and against the Company's disciplinary policy generally.

[28] The remedy for any lack of response by the Company is set out in the Collective Agreement. An arbitrator has no basis to interfere with an agreed remedy that is set out in a Collective Agreement.

[29] The Company's discipline policy is under separate Grievance. Each case has been assessed by this Office for reasonableness under the *Re Wm. Scott* framework, with consistent application of the Company's discipline policy only being one factor.

[30] In its medical questionnaires to determine Fitness to Work, the Company did not only seek information on conditions which the Grievor had been ***diagnosed*** with. Rather, It listed various diagnoses *and* also various symptoms, which will be described as "X" in this Award.

[31] It is the existence of "X", and not just whether an underlying medical condition was *diagnosed* that was sought by the Company. The failure alleged is the Grievor's failure to properly *disclose* "X", as required by the Company's question.

[32] Section 16, Part C of the Reinstatement Agreement states that "[f]ollowing reinstatement, any alleged violation or failure to comply with any of the terms of this Agreement will result in Mr. Lunar's removal from service and an investigation". The Reinstatement Agreement also stated that if the Grievor "fails to comply with Health Services' and/or Disability Management's requirements, this Agreement will be void and he will remain in dismissed status" (at para. 8, Part B).

[33] The Grievor was Investigated on January 2, 2023. The Grievor stated that certain medical information was incorrect regarding his diagnoses for a medical condition (for which he had been off work in 2021/2022 for more than a year), and also there had been

no diagnosis of any other medical conditions. At the time of the Investigation, the Grievor had been off for “13/14 months” to demonstrate stability of that condition (Q/A 12).

[34] It was the Grievor’s evidence there was no diagnosis to support that there was a diagnosed medical condition causing “X”, which was why the Grievor selected “no” when asked about that symptom in March of 2018 and in 2021 on the reassessment (Q/A 9). The Grievor argued he did not have “X” as a symptom, but instead had another symptom.

[35] The Grievor’s childhood symptoms were described by the Grievor as “like” “X”, which was a symptom of a certain medical condition – “Y”. The Grievor stated that testing had occurred for “Y” and he did not have that underlying condition. The Company relied on medical information provided by the Grievor’s doctor where – in past history – it is noted that the Grievor had been having “X” “…as a kid which have been occurring again recently which Seth notes seems “stress induced”. The Union sought to explain this reference with further information from that doctor that this was information “self-reported” by the Grievor and not witnessed by the physician. While “X” was stated by the Grievor’s physician to be “reoccurring” in a report dated September 10, 2021 (two months before the Grievor completed the questionnaire; when he had not slept well and was “stressed out””), the Grievor maintained that his answer was stated as “no” to the *two* questions at issue, given there was no diagnosis of “Y” made when he was a child.

[36] I am satisfied on review of the medical information – including the doctor’s follow-up note - that the Grievor had not just experienced “X” “25 years” earlier as argued by the Union, but ***also*** had experienced – and described – that same symptom of “X” in the same term used by the Company in its questionnaire to his doctor as late as the Fall of 2021.

[37] Regardless of how the Grievor’s medical condition may or may not be medically described, the Grievor used the exact word used by the Company to describe it to the physician in the Fall of 2021. While the Grievor’s physician sent a letter stating that initial report of “X” in 2018 were self-reported and that the physician had not made *a diagnosis* of any underlying disorder for “X”, *there was no retraction that the Grievor reported to the physician that “X” was ‘occurring again recently” and was ‘stress-induced’, as late as Fall 2021*. Particularly, there was no suggestion the Grievor did not state to the physician that he was having “X” “recently” due to “stress”.

[38] That information not only confirms the Grievor's understanding in the Fall of 2021, but also confirms the understanding of what he had experienced as a child, which should have been disclosed by the Grievor in both his Pre-Employment information in 2018 and again in 2021.

[39] Section 4.2(d) of the Company's Fitness to Work Procedures requires employees to "Comply with all applicable medical monitoring requirements outlined in this policy and procedure. Section 4.3 states that "Health Services" is responsible to "determine the medical fitness to work assessments for candidates and employees of CP (Canada) and individuals who may perform Safety Critical…duties". Section 5 states that "Any employee who violates the terms of this policy may be subject to removal from service from a Safety Critical…Position and subject to investigation and discipline, up to an including dismissal".

[40] While the Union argued the Grievor had not had any medical diagnoses to explain "X" (Q/A 10), and in particular "Y", the issue is not whether or not there was failure to disclose a ***diagnosed*** medical condition. That no diagnosis was made of "Y" does not diminish the experience that the Grievor suffered "X" as a symptom or that experience with "X" was sought by the Company. The very fact the Grievor was even *tested as child* for "Y" demonstrates the relevance of "X", given that it is a common symptom for "Y".

[41] I am satisfied from a careful review of all of the evidence that the Company's questionnaire seeking the Grievor's medical information was broad (under *two* different questions) and that at least one of those questions should have reasonably resulted in the answer of "yes" by the Grievor for "X", ***even if*** there was no diagnosed underlying medical condition such as "Y" arrived at to *explain why* those symptoms were occurring. I am also satisfied that was information which would have caused the Company to explore that medical issue before the Grievor would have been qualified to return to his safety-critical work as a Conductor in December of 2021, had the Grievor disclosed that information.

[42] While the Union argued the Company had not taken those steps to seek further medical information once it determined this was an issue, the Company was not obliged to accept the Grievor's late disclosure and then make that assessment *before* disciplining the Grievor for that non-disclosure. The Grievor was not dismissed *because* he had

experienced “X” that could be incompatible with his safety-critical work, but because he failed to *disclose* “X” to the Company. That questionnaire in December 2021 was a mere few months after the Grievor stated there had been a recurrence of “X” from childhood, when tired and stressed.

[43] The Reinstatement Agreement required the Grievor to cooperate in addressing his medical reinstatement. Under both the Reinstatement Agreement – and the Company’s Fitness to Work Policy & Procedures – the Grievor had an obligation to be candid and truthful on any documentation which the Company asked the Grievor to complete to that end. That obligation is of considerable import when the Grievor is working a safety-critical role in what is a highly safety-sensitive industry involving the movement of industrial equipment and also given that this Grievor was also in a very precarious employment position, given his employed was subject to a Reinstatement Agreement.

[44] The Grievor was not truthful. The Grievor breached his obligations under the Company’s Fitness to Work Policy, which was reflected in his Reinstatement Agreement.

[45] The next question therefore is what is the result of the Grievor’s lack of candour?.

[46] Given that breach, under the Reinstatement Agreement, the Grievor stood in a dismissed state. This Reinstatement Agreement was a form of “last chance agreement” for this Grievor. He had a choice not to enter into that Agreement, and instead wait for his Grievance to be heard. Instead, with Union representation, he entered in the Reinstatement Agreement, which had specific conditions.

[47] The jurisprudence supports considerable respect by Arbitrators for “Last Chance” type agreements. Such agreements have been negotiated freely by the parties at a time when a grievor stood dismissed; the effect of such an agreement serves to place that grievor back to work – with conditions agreeable to the Grievor – and interference with such agreements would disincentivize the Company to enter into those arrangements for Grievor’s who stand in precarious positions. That does not lead to positive labour relations.

[48] Given the deference owed to Last Chance agreements; and considering all of the facts and circumstances, this is not an appropriate case to interfere with the agreement

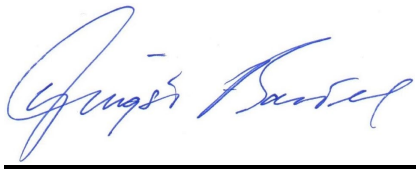
reached by the parties that if the Grievor did not meet the Company's requirements, the Grievor would stand dismissed.

[49] Even if that were not the case, and it was found appropriate to undertake a *Re Wm. Scott* analysis of the dismissal decision, the dismissal would have been upheld: The Grievor does not enjoy the usual mitigating factors of long-service or of a positive disciplinary record. While the Union argued lack of "intent", that is only one factor in a *Wm. Scott* analysis. It is not determinative for cases of non-disclosure. All facts and circumstances must be reviewed. The Grievor was a short-service employee who already stood in a very precarious employment situation, being subject to a Reinstatement Agreement. He appears to have forgotten that just two months earlier, he described he had experienced as "X" to his doctor, but then denied he experienced "X" when asked by the Company. The Grievor's precarious position under a Reinstatement Agreement would also have been a relevant factor to consider.

[50] Regrettably for this Grievor, the usual mitigating factors that could attract an Arbitrator's discretion to mitigate the ultimate penalty assessed against the Grievor are absent. It would not have been appropriate to give the Grievor "another" last chance, even if a *Wm. Scott* analysis had been applied.

[51] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award; and to correct any errors; and address any omissions, to give this Award its intended effect.



February 12, 2025

CHERYL YINGST BARTEL
ARBITRATOR