IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Employer")

AND:

UNIFOR LOCAL 101R
(the "Union")

(Sean McDonagh Accommodation and Discipline – Grievance No. 58-2018-001; CAN-UNIFOR-2018-00007)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Sharney Oliver for the Employer
	Jim Wiens for the Union
HEARING:	December 2, 2020 Virtual hearing
PUBLISHED:	February 16, 2021

The parties agreed I was properly constituted as an arbitrator under the terms and provisions of the Collective Agreement with the requisite jurisdiction to hear and determine the matters in dispute.

This matter pertains to a grievance filed by the Union on behalf of the grievor, Sean McDonagh, challenging the 10-day suspension issued to him on January 19, 2018 after he tested positive for amphetamines.

FACTS

The background facts giving rise to this grievance are as follows. The grievor has worked for the Employer since May 1998. On May 3, 2016, he was dismissed from CP Rail for failing a drug test. His employment was subsequently reinstated by way of a Reinstatement Agreement dated April 15, 2017 signed by both the grievor and the Union on April 25, 2017. The Agreement lists the "mandatory conditions of Mr. McDonagh's reinstatement as follows:

1. Before return to service takes effect Mr. McDonagh must provide the Company with a Functional Abilities Form.
2. Prior to returning to work Mr. McDonagh must submit to all OHS requirements which will include a substance test as directed by OHS.
3. Mr. McDonagh will be subject to a continuation of all of the terms and conditions within the contract(s) he was governed by at the time of his non-compliance with OHS requirements that led to his dismissal in 2016.
4. Mr. McDonagh will comply with the requirements of CP OHS (Occupational Health Services) and be determined to be medically fit to return to service.
5. It is understood by all signatory parties that, Mr. McDonagh, notwithstanding the objective for Mr. McDonagh to become fit for full duties within the position of Diesel Service Attendant, he may, until then, have to follow the RTW (Return to Work) accommodation process.

6. Further to the conditions reference above, Mr. McDonagh must also comply with the following prior to returning to work:
   a. Prior to any return to active service Mr. McDonagh will be required to successfully complete a screening interview with his manager concerning his ongoing employment. The purpose of this interview will be to review the Company's performance expectations regarding the return to work of Mr. McDonagh and to provide full understanding and clarity regarding these expectations. If he desires, an accredited representative may accompany Mr. McDonagh to this interview.
   b. Mr. McDonagh shall strictly comply with all of Company's policies, procedures and work practices, the Alcohol & Drug Policy and Procedures.
7. Other than indicated within this letter, Mr. McDonagh shall not be paid any compensation or benefits for time out of service.
8. Any alleged violation of or failure to comply with the terms of this Agreement will result in removal from service and an investigation
9. There shall be no grievance advanced in respect of this Agreement.
10. The parties clearly understand and agree that any non-compliance with OHS requirements on the part of Mr. McDonagh will result in a formal investigation and;

    if, following a fair and impartial investigation, the Company determines that Mr. McDonagh violated or failed to comply with any of the terms and conditions of this Agreement:
    a. lt shall be considered just cause for the termination of the employment of Mr. McDonagh;
    b. The Company, in its sole discretion, may elect to dismiss Mr. McDonagh from Company service or impose a lesser disciplinary penalty;
    c. Any grievance regarding the discipline assessed shall only be for the purpose of determining whether Mr. McDonagh violated or failed to comply with the terms and conditions of this Agreement.
11. This Agreement is without precedent to positions that may be taken by the Company or the Union in similar circumstances involving other employees and is not to be used in any way in future grievances or arbitrations or as a

precedent in cases involving other employees. lt is expressly understood that this Agreement is based upon the unique facts of this case.

12. Mr. McDonagh agrees that he has had an opportunity to consider the terms of this Agreement and consult with anyone he wishes, including a Union representative. Mr. McDonagh also confirms that he understands the terms of this Agreement, that he was not under the influence of any drugs or alcohol at the time of review or signing of this Agreement, and he has signed this Agreement freely and voluntarily.
13. This Agreement will remain on the employment record of Mr. McDonagh and may be utilized in the event that he appears before an arbitrator regarding this Agreement or any other future proceeding.

The grievor did not undergo the required medical assessment until on or around July 4, 2017. On or around July 11, 2017, the Employer was informed that the grievor's urine test was positive for amphetamines.

The grievor was declared fit for modified duties with restrictions from Safety Sensitive and Safety Critical Positions on or around August 1, 2017. At a return-to-work meeting on August 16, 2017, the Employer advised that it was not possible to return the grievor to the shop floor on the basis of the information it had at the time, and that the grievor was limited to sedentary duties. It advised the Union that no work of this type was available at the Port Coquitlam facility at that time. The grievor was advised that a return to work plan would be put in place once the Employer received updated medical from the grievor's doctor.

On November 6, 2017 the grievor was given notice of a formal investigation into his "reinstatement substance test results." The reason for this delay in issuing this notice was not explained in the parties' submissions. A formal investigation into the positive test result was conducted on November 16, 2017. During this meeting, the grievor declined to answer questions about

the delay in taking his return to work medical assessment. A further formal investigation was conducted on December 15, 2017. The grievor remained off work during this period and was subsequently issued a 10-day record suspension on January 19, 2018 which is the subject of the present grievance.

The Union filed the present grievance on February 2, 2018, which outlines the nature of the complaint as follows:

> On January 19, 2018, Port Coquitlam Diesel Service Attendant Sean McDonagh was assessed a ten-day record suspension for; "not complying with Health Services Requirements." No rule violation was specified, and no definite non-compliance requirement was identified.
>
> This discipline is without merit. The Union's investigation into this matter also failed to recognise any rule violation and confirmed that Mr. McDonagh followed all directives and instructions from Health Services Department of the Company flawlessly during his return to employment. The only violation distinguished during either investigation was the Company's ongoing failure to comply with the agreed terms of Mr. McDonagh's reinstatement agreement, including the ongoing decision to deny Mr. McDonagh employment, despite being cleared for non-safety sensitive duties on August 1, 2017. Despite the frustration of six months of delays since the clearance, Mr. McDonagh has remained active and engaged in his return to work process. He has attended every meeting including a return to work meeting on August 16, 2017 and as all days of statements requested during the formal investigation into this matter in November and December 2017.
>
> The Company continues to be unable to identify any reason to have Mr. McDonagh out of service for this expanding period. The Union's formal letter of October 13, 2017, which previously identified Mr. McDonagh's completion and compliance to all 13 reinstatement requirements and requesting senior management to get involved to expediate the process was ignored:

October 13, 2017

Dear Mr. Bairaktaris,

This is in connection with the ongoing delays in returning employee Sean McDonagh to service following the reinstatement agreement signed on April 25, 2017.

You will recall the agreement contained 13 mandatory requirements that would need to be completed prior to his return to active duty. While Mr. McDonagh has complied with all 13 requirements, CP Rail continues to hinder his return to work and has not been able to provide justification for the delay.

Correspondence with you on August 6, 2017, we underscored our desire to have you get involved in the process to expediate his return. That email thread included confirmation that Mr. McDonagh has previously been cleared by OHS to work in a non-safety sensitive position. It was clearly understood and documented in the agreement that the primary objective was to have Mr. McDonagh return to work in his previous position as a Diesel Service Attendant, however it also identified that he may have to be accommodated within the Return to Work process. At that time, the Union identified their concerns with the breadth of information being requested by the Company, however reserved any formal action strictly to expediate Mr. McDonagh's return. While the Company used the complied information to conclude that he was not fit to return into a safety sensitive position, no reason was given for that determination. The Return to Work meeting held on August 16, 2017 failed to identify any justification and no documentation was brought forward to substantiate the restrictions proposed by OHS. The minutes of the meeting confirm that no attempt was made to accommodate Mr. McDonagh within his classification, within the bargaining unit, or finally outside the bargaining unit, as his rights entitle him under Rule 17 of the Collective Agreement.

The signed Offer of Reinstatement identifies that Mr. McDonagh would be compensated the amount of

> twenty thousand dollars within 30 days following his first day of work (or within 30 days of his being cleared for duties in an accommodated role). As the Company wrote Mr. McDonagh to advise him he was cleared for duties in a non-safety sensitive position on August 1, 2017, the payment of this compensation is also substantially delayed.
>
> We must again request your immediate involvement in this matter to identify the delays in Mr. McDonagh's reinstatement, facilitate his immediate return to service, and arrange compensation for all lost wages following the determination of his fitness for duty.
>
> Sincerely,
>
> Jim Wiens
> Unifor Local 101R
> Vice-President – Western Region

Resolve Requested:

The Union must first demand that the Company immediately reinstate Mr. McDonagh with compensation for all lost wages and make him whole in every aspect including overtime opportunities, pension, and CCS.

The discipline assessed must be expunged from Mr. McDonagh's record, with formal written notice advising Mr. McDonagh of the removal.

A further return-to-work meeting was held with the Employer's Disability Management team on February 7, 2018, at which time a vacant non-safety sensitive position was identified for the grievor at the Port Coquitlam facility. At the next return-to-work meeting on March 16, 2018, it was agreed the grievor could return to work as a temporary accommodation in a Labourer position for three days per week for two weeks beginning March 19, 2018, with a full return to work for five days per week beginning April 2, 2018.

The parties filed a Joint Statement of Issue, reproduced below.

Joint Statement of Issue

On January 19, 2018, Mr. McDonagh was issued a ten (10) day record suspension for the following reason: "not complying with Health Services requirements"

The Union contends that:

- this discipline is without merit. No rule violation was specified, and no definite non-compliance requirement was identified
- the only violation distinguished during either investigation was the Company's ongoing failure to comply with the agreed terms of Mr. McDonagh's reinstatement agreement, including the ongoing decision to deny Mr. McDonagh employment, despite being cleared for non-safety sensitive duties on August 1, 2017
- the Company is unable to identify any reason to have Mr. McDonagh out of service for this expanding period. The Union's formal letter of October 13, 2017, which previously identified Mr. McDonagh's completion and compliance to all 13 reinstatement requirements and requesting senior management to get involved to expediate the process was ignored

The Union requests that:

- The Union must first demand that the Company immediately reinstate Mr. McDonagh with compensation for all lost wages and make him whole in every aspect including overtime opportunities, pension, and CCS
- The discipline assessed must be expunged from Mr. McDonagh's record, with formal written notice advising Mr. McDonagh of the removal.

The Company disagrees with the Union's contentions and has denied the request stating that:

- The employee's culpability into this matter has been established by a fair and impartial investigation
- Mr. McDonagh was reinstated by agreement on April 15, 2017 stating that he must comply with all OHS requirements
- As this condition was violated, Mr. McDonagh was appropriately submitted to a formal investigation

- The Company maintains that due to all the circumstances, the discipline issued was reasonable and justified

POSITIONS OF THE PARTIES

Position of the Union

The Union contends the discipline is without merit as there was no culpable cause in this case. In its submission, no rule violation was specified and no definite non-compliance requirement was identified. Indeed, the Union submits the only violation uncovered during either investigation was the Company's ongoing failure to comply with the agreed-upon terms of the Reinstatement Agreement by failing to return Mr. McDonagh to employment, despite his clearance for non-safety sensitive duties on August 1, 2017. According to the Union, the Employer has not shown why it held Mr. McDonagh out of service for such an extended period.

The Union asserts that the Employer's repetitive testing and investigations of the grievor were excessive and unnecessary and resulted in a 329-day delay in returning him to work. The Union objects to the Employer's failure to provide documentation to support its investigations, asserting the Employer's actions violate Appendix 15 of the Collective Agreement. With respect to the positive drug test results, the Union asserts the grievor informed the Employer that his doctor had prescribed him Adderall.

The Union requests a finding that the Employer has not upheld its commitments in the reinstatement agreement of April 2017. The Union seeks for the suspension to be overturned and expunged from the grievor's record, and that he be compensated for all losses arising from the Employer's failure to accommodate the grievor since August 1, 2017.

Position of the Employer

The Employer asserts the discipline in this case was fair and reasonable and that the grievor's culpability was established by a fair and impartial investigation during which the grievor was dishonest. The Employer maintains that due to all the circumstances – including the fact that the grievor made several attempts to evade his reinstatement medical assessment – the discipline issued was reasonable and justified.

The Employer characterizes the Reinstatement Agreement as a "last chance agreement" – noting that in it, the grievor undertook to comply with all occupational health and safety requirements. The Employer asserts the parties agreed that any grievance regarding discipline arising from any violation of the Reinstatement Agreement would be limited to a determination of whether the grievor had failed to comply with its terms and conditions, and removes any jurisdiction for an arbitrator to substitute any other penalty or to award compensation.

Further, the Employer objects to the Union's attempt to frame the grievance as a failure to accommodate, submitting any such argument by the Union is untimely given that it should have been filed within 20 days of the date of infraction. In any event, the Employer takes the position that it is the grievor who is responsible for the delay in his return to work due to his refusal to attend medical appointments which the Employer asserts has provided grounds for dismissal in accordance with that agreement.

The Employer requests that I uphold the record suspension and dismiss the grievance in its entirety.

DECISION

After carefully considering the submissions of the parties, I have concluded that the grievance must be dismissed.

In so finding, I agree with the Employer that the grievance is not properly framed as a duty to accommodate grievance. While the grievance does complain about the grievor being held out of service and requests the grievor to be immediately reinstated, it does not allege a breach of the *Human Rights Act*, nor does it allege that the Employer has failed to accommodate the grievor or that it has not met its onus to prove undue hardship.

Further, the Union has not provided sufficient evidence upon which I could make such a finding even if the grievance could properly be framed as a duty to accommodate issue. Given that there is no dispute the Employer could not return the grievor to his former position given his repeated failed drug tests and the medical on file, the Union has failed to identify how or where the grievor could be accommodated, I simply cannot find the Employer has breached the *Human Rights Act* nor the Collective Agreement. There simply is not a sufficient evidentiary basis for me to make such a finding.

With respect to the ten-day record suspension, I find the discipline to be reasonable. The grievor had undertaken to comply with numerous conditions in the Reinstatement Agreement in April 2017, and on the documents before me, it appears he did not comply – including by producing a positive drug test in July 2017.

For all of the foregoing reasons, I conclude the grievance is without merit.

The grievance is dismissed. It is so awarded.

This award is issued pursuant to the arbitration provisions of the Collective Agreement (Rules 29.1-29.7).

Dated at the City of Vancouver in the Province of British Columbia this 16th day of February, 2021.

Vincent L. Ready