CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4347

Heard in Montreal, November 13, 2014

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADIAN RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Peter Armillotta.

UNION AND COMPANY EX PARTE STATEMENT OF ISSUE:

On April 19, 2012, following an investigation, Conductor Armillotta was dismissed from Company service "For providing false and/or misleading information during a formal investigation, and for making lifestyle choices that are incompatible with your Safety Critical position at Canadian Pacific that adversely affected your fitness for work, as evidenced by your use of cocaine on the evening of February 24th, 2012, violations of: Policy OHS 4100, Policy OHS 5100, GOI Section 3, Item 7.1, CROR General Notice, and CROR General Rule A (i), (iii), (vi), (x), while employed as Conductor on RS5 in Coquitlam, British Columbia, on February 25, 2012."

The Union contends that the penalty of discharge is excessive in all of the circumstances. Further, the Union contends that the Company's termination of Mr. Armillotta's employment breaches the Collective Agreement and the *Canadian Human Rights Act,* including its duty to accommodate Mr. Armillotta under the *Act.*

The Union requests that Mr. Armillotta be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company raises a preliminary objection with the Union's position. Specifically, nowhere within any of the associated grievance correspondence has the Union cited any violation at all of the Collective Agreement, any breach of the *Canadian Human Rights Act,* or the Company's duty to accommodate Mr. Armillotta under the *Act.*

Additionally, the Union's grievance sought only to have Mr. Armillotta reinstated, but made no request for lost earnings with interest.

The Company reviewed the arguments contained in the Union's grievance submission, made a determination based on the material that had been properly progressed through the final step of the grievance procedure, and denied the Union's request accordingly.

The Company objects to the new arguments the Union is attempting to introduce for the first time at arbitration, as well as the new remedy being sought. The Union has inappropriately expanded the scope of their grievance on several fronts, contrary to both arbitral jurisprudence

and the Memorandum of Agreement Establishing the Canadian Railway Office of Arbitration & Dispute Resolution.
The Company requests that the scope of the hearing be limited to only those issue that have been properly advanced through the final step of the grievance process.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) K. Stuebing	**(SGD.) M. Moran**
General Chairman	**Labour Relations Officer**

There appeared on behalf of the Company:

M. Moran	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Vice General Chairperson, Medicine Hat
J. Hnatiuk	– Local Representative, Port Coquitlam
P. Armillotta	– Grievor, Port Coquitlam

AWARD OF THE ARBITRATOR

The grievor was discharged on April 19, 2012 for providing false and/or misleading information during a formal investigation and for making lifestyle choices (using cocaine on February 24, 2012) that are incompatible with his safety critical position, which the Company alleges adversely affected his fitness for work.

The Union asserts that the dismissal is excessive and breaches the *Canadian Human Rights Act ("CHRA")*, including the Company's duty to accommodate the grievor's disability.

The Company raises a preliminary objection with respect to the Union's *CHRA* argument.

Factual background

The grievor is fifty-one years old and has worked for the Company since 1981. The grievor has a lengthy disciplinary history. However, on February 25, 2012, the grievor had zero demerits on his disciplinary record.

On February 25, 2012 the grievor was working as a Conductor on R5S (Roadswitcher) of Coquitlam, B.C. The grievor commenced work at 09:30 with two other employees working on his crew. At approximately 18:15 the crew was involved in a sideswipe collision and derailment.

Post accident testing was conducted at 09:03, 09:12, and 09:27 on February 25, 2012. The grievor's tests returned positive for drugs.

On March 1, 2012 the grievor was investigated in connection with the February 25, 2012 accident. On March 12, 2012 the grievor and his crew members were each assessed thirty demerits for their involvement in the accident on February 25, 2012.

The Company conducted a separate investigation on March 10, 2012 with respect to the positive drug test. The Company advised the grievor that he tested positive for drugs. The Company asked the grievor if he was willing to provide the name of the substance. The grievor told the Company that he used cocaine between 20:00 and 21:00 on the evening of February 24, 2012.

I note that the Union and the Company are parties to an agreement dated June 16, 2010 relating to the Company's Revised Substance Testing Policy (the "Agreement"). Pursuant to that Agreement, the grievor was under no obligation to answer the question with respect to the specific substance nor was he under an obligation to release to the Company and the Union the specifics with respect to the drug test results. The grievor had a right to refuse to answer such questions without any consequence or adverse inference.

During the March 10, 2012 investigation, the Company asked the grievor if he had a cocaine dependency problem and he replied "no." The grievor said that the cocaine use was a "one time thing" and a "bad choice." The grievor also indicated that he'd only used a "small amount of cocaine." The grievor told the Company that he'd made a mistake and that he was truly sorry for his bad decision. The grievor said he was embarrassed and that he was willing to do whatever the Company asked of him to keep his job.

On March 17, 2012 the Coquitlam Trainmaster recommended to Superintendent Brad Thiede that discipline of forty-five demerits be imposed on the grievor for the positive drug test. Instead, on March 20, 2012 at approximately 09:30, Superintendent Thiede called the grievor and requested that he come to his office for a meeting.

The grievor arrived at approximately 11:35 and met with Superintendent Thiede for approximately one hour. The grievor and Superintendent Thiede discussed the accident, as well as the grievor's drug and alcohol use. The grievor told Superintendent Thiede that he not had a drink since he was nineteen years old. The grievor also said that he had used cocaine in the 80's but had given it up back then. The grievor told Superintendent Thiede that his cocaine use on February 24, 2012 was the first time he had used it in many years and it was a stupid mistake.

The grievor told Superintendent Thiede that he did not believe that the cocaine impaired him in any way. Instead, the grievor attributed the accident on February 25, 2012, to the crew trying to hurry and clear a private crossing for people at a boat club.

Then the discussion turned to the grievor signing a release form so that the test results could be released to the Company's Occupational Health Services (OHS) and Dr. Leo Kadehjian. The grievor told Superintendent Thiede he had nothing to hide and signed the consent.

After reviewing the test results, OHS was of the opinion that the grievor's admission of drug use on February 24, 2012 was inconsistent with the test results. The Company also obtained the opinion of Dr. Kadehjian who reported on March 27, 2012 as follows:

> Taken together, the laboratory results for Mr. Armillotta's urine and oral fluid specimens are clearly inconsistent (sic) his claim of use of only a small amount of cocaine only once some 24 hours prior to his specimen collections. Rather, based on the clinical literature, I conclude that Mr. Armillotta's test results

represent use of significantly more cocaine than claimed, likely in the order of several hundred milligrams.

In his report, Dr. Kadehjian did not suggest that the amount of cocaine the grievor consumed on February 24, 2012 would have impaired him while at work on February 25, 2012.

Based on Dr. Kadehjian's report and the opinion of OHS, the Company conducted a supplemental investigation on April 5, 2012. During the supplemental investigation, the grievor admitted snorting a line of cocaine on a CD cover through a rolled up bill. The grievor described a line of cocaine and a "pile" of it. The grievor also admitted to snorting five or six lines from the pile outside of an Applebee's Restaurant and another five or six lines outside his residence all within a two hour period before approximately 22:30 on February 24, 2012. When asked about his earlier reference to only consuming a small amount the grievor said; "I can only say that what may be a small amount to me, is not considered a small amount. I don't know what the definition of a lot of it is, or what a small amount is. I guess it wasn't a small amount."

Clearly there were inconsistencies between the grievor's evidence during the two investigations, as well as with respect to the information he provided to Superintendent Thiede on March 20, 2012.

Though the grievor was honest with respect to some information, including the type of drug used and generally when he used it, he was misleading with respect to his

consumption of drugs generally and the amount of cocaine he consumed on the evening in question.

The Company asked the grievor whether he'd sought or taken any type of treatment for drug dependencies. The grievor answered "no I haven't." The Company did not follow up with questions with respect to whether or not the grievor believed he needed any assistance or treatment for drug dependency.

Near the end of the investigation the grievor indicated that he would be more than willing to agree to any conditions in order to keep his job and that he was truly sorry.

The Company terminated the grievor on April 19, 2012.

On July 30, 2012 the Union filed the Step One Grievance indicating "the Union does not argue the facts established within the investigation, however would like it noted that this dismissal was not for a violation of General Rule G." The Union urged the Company to review the dismissal and provide the grievor with another chance to prove his value as a senior and productive employee. The Union suggested that the Company entertain reinstating the grievor subject to guidelines set out in an employment contract as determined by the Company.

The Company responded at Step One on September 18, 2012, indicating that Article 2.1.4 of Procedure #OHS 5100 refers to CROR Rule G. The Company pointed out that employees are governed by that rule and the Policy aligns with and supplements the requirements of CROR Rule G. The Company maintained their original position, declining the grievance.

On December 30, 2013, the Union appealed to Step Two of the grievance procedure. In the Step Two appeal, the Union raised the issue of "substance abuse" and advised the Company that the grievor was attending support groups including both Alcoholics Anonymous (AA) as well as Narcotics Anonymous (NA). The Union also advised the Company that the grievor was in contact with EFAP and "continues to utilize their advice." Further, the grievor was actively seeking a treatment program that would address his family obligations and his medical needs. The Union pointed out that the grievor was the primary care-giver for his elderly parents, who both had medical conditions.

The Company responded February 11, 2013 indicating that they would object with respect to the Union's stated desire to allege a violation of the "collective agreement and/or any applicable statutes, legislation, acts or policies".

On August 5, 2014 the Union provided the Company with information respecting the grievor's efforts to address his addiction to cocaine. The following information was provided:

1. The Elan Experience discharge summary dated May 15, 2014 (with attached receipts;

2. AA-NA Attendance;

3. Letters of support and letters from the grievor with respect to his efforts at rehabilitation;

4. A letter from Dr. Owen James Ph.D, a registered psychologist indicating as follows:

> At your request, I met Mr. Armillotta on January 17, 2014 for the purpose of reviewing the current status of his rehabilitation. Mr. Armillotta spoke frankly about his life history and his use of drugs and alcohol. I note that Mr. Armillotta has never had a problem with alcohol dependence, and he has not consumed alcohol since the age of 19 (he is currently age 51). However he has used marijuana and cocaine intermittently. From his self-report, it is likely Mr. Armillotta was cocaine dependent for most of 1988; however, from then until 2008 he did not use any cocaine. Mr. Armillotta stated that he relapsed into cocaine use in 2008 but again stopped using the drug in 2012. Since that time, Mr. Armillotta has been "clean" of drugs and alcohol. He has also attended (and continues to attend) NA meetings on a weekly basis, and until very recently, he was also attending AA meetings where he has now completed the Twelve Step Program. Mr. Armillotta also explained that he was the primary care-giver to his elderly parents, both of whom are disabled by virtue of cardiovascular disease.
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> Based on my meeting with and assessment with Mr. Armillotta I am of the opinion:
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> 1. He has been both open and honest about the extent of his prior addiction and the current status of his current recovery.
> 2. Mr. Armillotta is currently pursuing a course of treatment/ rehabilitation which is working very effectively.
> 3. If assessed by a professional drug/alcohol specialist, Mr. Armillotta's current status and efforts would receive endorsement.

In their brief, the Union submitted a report from Dr. Donald Hedges M.D. dated March 13, 2014. Dr. Hedges' practice is devoted primarily to addiction medicine including comprehensive medical examinations of employees, including those in safety

sensitive occupations. Dr. Hedges provides treatment protocols, facilitates access to treatment and assists with relapse prevention and relapse management including medical monitoring. Dr. Hedges' report is extensive and provides treatment recommendations that would permit the grievor's return to work in his former position.

Decision

The first issue to be addressed is the Company's preliminary objection to the Union's argument under the *CHRA.* After carefully considering the submissions of the parties, I am dismissing the Company's preliminary argument for reasons stated below.

Section 60 (1) (a.1) of the *Canada Labour Code* provides as follows:

> 60 (1) An arbitrator or arbitration board has…
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> (a. 1) the power to interpret, apply and give relief in accordance with this statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;

In *Parry Sound (District Social Services Administration Board) the O.P.S.E.U. Local 324* [2003] SCR 157 ("*Parry Sound*"), the Supreme Court of Canada made it clear (interpreting similar language under the *Ontario Labour Relations Act*) that arbitrators not only have the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment related statues as if they were part of the collective agreement.

In *Parry Sound*, the Supreme Court of Canada also addressed the importance of complying with procedural requirements under a collective agreement. At paragraph 68 of the decision Iacobucci J. stated as follows:

> As a general rule, of course, it is important that the parties to a collective agreement comply with procedural requirements set out therein. If a trade union intends to plead that the employer has breached the employees statutory rights, it should, as a matter of general practice, specify the statutory provision that the employers alleged to have breached. That said, it is important to acknowledge the general consensus among arbitrators that, to the greatest extent possible, a grievance should not be won or lost on the technicality of form, but on its merits. In Re: *Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Jointers of America*, *Local 2486* (1975), 8 OR(2nd) 103 (C.P.A., at p.108, for example, Brooke J.A. wrote as follows:
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> Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one the proper position he would have been in had the agreement been performed.

In the matter before me, the essence of the grievance is that the grievor was terminated as a consequence of his positive drug test and his dishonesty during the investigation.

In my view, the Company knew or ought to have known that the grievor may have suffered from an addiction, which would then trigger obligations under the *CHRA*. Addiction to drugs and alcohol are disabilities under the *CHRA*, and recognized as such by this office in **CROA&DR 4054**.

I note that during the investigation on March 10, 2012 the grievor specifically denied having a cocaine dependency problem. The grievor also said his consumption

of cocaine on February 24, 2012 was a one-time thing. However, during the meeting on March 20, 2012 with Superintendent Thiede, the grievor admitted to cocaine consumption in the 1980's. Most importantly, the test results showed a greater use of cocaine than the grievor had admitted to during his March 10, 2012 interview. During the April 5, 2012 second investigation the Company asked the grievor if he had taken any treatment for drug dependencies. The grievor denied that he had. Unfortunately, no additional questions were asked of the grievor with respect to whether or not he was addicted to cocaine.

Arbitrators have accepted that addicts deny and lie to conceal their addiction, see *Legal Aid Lawyers Association v. Manitoba (Fosset)* (2009) 181 LAC 4th 296 (Graham) at paragraph 98.

The C*HRA* was a live issue in this case. Though it is unfortunate that the Union did not originally plead a breach of the *CHRA*, it was raised at Step Two of the grievance procedure. The Company had ample opportunity to respond to this issue prior to the submission to arbitration.

I acknowledge a number of Awards provided to me by the Company where this Office has refused to entertain arguments raised late in the process. However, I note that the majority of those Awards involved a new issue being raised at the point of the joint statement of issues stage and never being raised during the grievance procedure.

The evidence that the Union has brought forward in this matter may be described as “post discharge evidence.” However, in my view the evidence can properly be considered because it helps shed light on the reasonableness and appropriateness of the dismissal. The evidence is also helpful in exercising my discretion to vary the penalty, see *Toronto (City) Board of Education v. OSSTF District 15* [1997] 1 S.C.R. 487.

I acknowledge that the Company has suffered some prejudice because it was not provided with this evidence prior to discharging the grievor. However, this prejudice is addressed by not ordering compensation.

The next issue to be addressed is the Union’s objection to the Company’s reliance on CROR Rule G. I acknowledge the arbitral authorities that hold that an employer will be held to the reasons for discipline advanced at the time that the discipline was imposed, see *Aeroside Dispensers Ltd*. [1965] 15 LAC 416 (Laskin).

It is not necessary for me to decide this issue. Even if the Company were entitled to rely on CROR Rule G, there is no evidence before me that the grievor violated that rule. I would have expected Dr. Kadehjian to say the grievor was impaired at work if that had been revealed by the testing.

Turning to the merits of the case, the grievor tested positive and admitted to using cocaine while off duty on the evening of February 24, 2012. The grievor also

provided false and misleading information during the investigation into his positive drug test. However, the grievor provided some of the information to the Company during the investigation that he was not required to disclose. Furthermore, not being entirely honest is part and parcel of the grievor's disability (addiction).

The evidence provided by the Union is compelling. It demonstrates that the grievor suffered from a disability (an addiction) when he was terminated.

This Office has on many occasions addressed the issue of addictions and the Company's obligations under the *CHRA*. In **CROA&DR 2716** Arbitrator Picher said as follows:

> The Arbitrator cannot accept the argument of the Company's representative, nor the reasoning of certain cases decided in the earlier years of this Office, which predate current human rights legislation and arbitral jurisprudence, to the effect that an employee discharged for the possession or consumption of alcohol or non-prescription drugs cannot, thereafter, legitimately claim that he or she should be reinstated based on rehabilitation efforts undertaken after the discharge. Both legislation in Canada, such as the *Canadian Human Rights Code*, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering whether to exercise the board's statutory discretion to reduce the penalty of discharge. Any other approach would, in my respectful view, run contrary to current statutory standards which prohibit discrimination on the basis of an illness such as alcoholism or drug addiction, and specific statutory provisions which now compel employers and unions alike to explore means of reasonable accommodation for persons so afflicted.

In my view, the evidence of the grievor's rehabilitation efforts is compelling, indicating that he has made excellent efforts at rehabilitation and remains drug free. I

am satisfied, for reasons stated in prior awards of this Office, that the interests of the Company can be reasonably protected and balanced with the interests of the grievor by reinstatement subject to conditions protecting the Company against a relapse or reoccurrence.

Therefore, I direct that the grievor be reinstated into his employment, without compensation or benefits, but without loss of seniority.

The grievor's reinstatement shall be subject to the conditions I outline below, which I am of the opinion are necessary to accommodate his disability and protect the Company's legitimate safety concerns.

The grievor shall comply with all of the recommendations for treatments set out in Dr. Hedges report dated March 13, 2014 including, but not limited, to the following:

1) The grievor must completely and indefinitely abstain from alcohol and all illicit drugs.

2) The grievor shall attend at least three NA meetings every week indefinitely.

3) The grievor shall be subject to medical monitoring of abstinence. In this regard, the grievor shall sign a Monitoring Agreement to be in effect for at least three years, which shall include attendance at a monitoring clinic twice monthly until he returns to work and at least once monthly for random drug testing. The grievor shall be subject to random drug and alcohol testing at least 18 times per year using a truly random protocol. The Monitoring Agreement shall permit and authorize free communication between the monitoring clinic and the Company's OHS department.

4) The grievor shall be placed on a medical leave of absence for two months prior to reinstatement in the workplace, during this two month period the grievor will be entitled to all benefits including sick leave benefits and be

subject to rigorous medical monitoring to demonstrate stable abstinent recovery.

5) The grievor's return to the workplace will then be graduated on a half-time basis for two weeks amid then progress to regular hours.

In addition to the requirements set out by Dr. Hedges, the grievor will maintain a relationship with his family physician for ongoing support and monitoring. The Company may also request a physician's certificate every six months confirming the physician's support and any recommendations that may be necessary for the ongoing treatment. These restrictions may be readdressed after three years upon an application to this Office. Should the grievor fail to honour any of the conditions of his reinstatement, or should he test positive for alcohol or drugs, he will be subject to termination.

I recognize that the requirements and conditions imposed on the grievor in this Award are more than the usual conditions ordered by this Office. Accommodation should be tailored to the individual. In this case Dr. Hedges' recommendations provide a clear direction about the necessary restrictions required to protect the Company's interests and accommodate the grievor's disability.

December 4, 2014

JOHN L. STOUT
ARBITRATOR