CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4388

Heard in Montreal, April 16, 2015

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer J.B. of Saskatoon, Saskatchewan appealing the discipline of a 90 day suspension for his violation of CROR 439 and CROR 33 while operating train M31851-11 on the Warman Subdivision.

Appealing a discharge for violation of CRO Rule G and the Company's Policy to Prevent Workplace Alcohol and Drug problems while working as a Locomotive Engineer on train M31851-11 on July 13, 2014.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On July 13, 2014, Locomotive Engineer J.B. accepted a call for 0630 on Train M31851-11. At signal mile 190.6 on the Watrous subdivision, train M31851-11 failed to stop at a stop indication. A download of the locomotive recorder confirmed that the train was operating at 22mph, 12 mph in excess of the allowable track speed, in the minutes previous to the Rule 439 violation.

The Company conducted an investigation of the incident and concluded that Engineer J.B. had committed a CROR 439 and 33 violations and therefore, deserving of a corrective action in this case was assessed a 90 day suspension.

On July 13, 2014 Locomotive Engineer J.B. provided a breath sample in accordance with the Company's policy to Prevent Workplace Alcohol and Drug Problems. The results of the two breath samples indicated a Blood Alcohol Content of 0.044 and 0.045.

The Company conducted an investigation and determined that Engineer J.B. had violated Rule G as well as Company Policy to Prevent Workplace Alcohol and Drug Problems and terminated his employment.

The Union contends that the discipline in the first matter is excessive and, in the second, unwarranted.

The Company disagrees with the Union's contentions.

FOR THE UNION:

(SGD.)

FOR THE COMPANY:

(SGD.) J. Shields (for) K. Madigan
VP Human Resources

There appeared on behalf of the Company:

J. Shields	– Manager Labour Relations, Edmonton
K. Morris	– Senior Manager Labour Relations, Edmonton

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
B. Ermet	– Senior Vice General Chairman, Edmonton
B. Willows	– General Chairman, Edmonton
J. B.	– Grievor, Saskatoon

AWARD OF THE ARBITRATOR

The grievor has been identified as Locomotive Engineer J.B. (the "grievor") to protect his identity as the grievance involves privacy issues relating to what the Union contends is J.B.'s disability - alcoholism. The Company takes no issue with the Union's request; it does not, however, accept that the grievor suffers from a disability.

This grievance concerns the Company's issuance of a 90-day suspension to the grievor for having violated CRO Rule 439 and CRO Rule 33 and his termination for having violated CROR General Rule G ("Rule G").

The facts surrounding the incident, which ultimately resulted in the grievor's termination, took place on July 13, 2014. They are not in dispute. The grievor reported for duty that day at 08:30 hours after accepting a call for duty at 06:30 hours. He accepted the call for duty, reported for work and violated CRO Rule 439 and CRO Rule 33 under the influence of alcohol in violation of Rule G. The samples provided for post-incident alcohol and drug testing were obtained 2 hours and 43 minutes after the grievor

reported for duty - at 11:13 hours. They showed a Blood Alcohol Level ("BAC") of 0.044% and 0.045%.

Briefly, at 09:46 hours the grievor failed to stop his train until approximately 100 feet after he had passed a stop indication, when he was operating at 22mph – 12 mph in excess of the allowable track speed in the moments just before. The grievor acknowledged that he saw two signal indications, a "clear to stop" indication, followed by "slow to stop" indication. He knew the progression of signal indications meant that he was to stop at the next signal. According to the grievor's statement taken July 17, 2014, the train had accelerated faster than he had anticipated. Despite having made an automatic brake pipe reduction, the train passed the stop indication.

On the day of the incident the grievor contacted the Company's Employee and Family Assistance Program ("EFAP") and through a counsellor was referred to Pine Lodge Treatment Centre – a residential treatment centre for people suffering from addictions. He began attending Alcoholics Anonymous meetings. By July 17, 2014, the date of the grievor's investigative statement, he informed the Company that he was waiting for a vacancy in the 28-day residential treatment program, acknowledging he had a "problem." The grievor appreciated that he had put lives in danger by his misconduct and was grateful that he had not killed anyone.

Decision

I am unable to agree with Union's submission that the imposition of a 90-day suspension for what is undeniably among the most serious of Cardinal Rule violations committed in circumstances where the train was travelling at more than twice the allowable track speed is excessive. I am also unable to accept the Union's arguments in support of mitigation of the suspension imposed by the Company - his so-called inexperience (a locomotive engineer for over six years) – or his unfamiliarity with the territory, as compelling reasons to consider a less severe form of discipline.

Moreover, the Union has not provided any jurisprudence in support of its position that the 90-day suspension is not within the reasonable range of discipline imposed for infractions of this nature. **CROA&DR 4105**, relied on by the Company, is analogous to the case before me (although there was no Rule G violation). In that case Arbitrator Picher did not consider it appropriate to disturb the 90-day suspension imposed by the Company for the locomotive engineer's clear Rule 439 violation when he failed to call a signal and "perhaps most seriously allowed his movement to proceed at close to twice the permissible speed," which in that case was 19mph. The locomotive engineer in **CROA&DR 4105** had thirty-eight years of service and had been disciplined only once approximately fifteen years prior to the incident for a Rule 104 violation.

The more difficult issue in this case is whether the grievor should be given a chance to continue his career with the Company considering its obligations pursuant to the *Canadian Human Rights Act ("CHRA")*, which prohibits discrimination on the basis of

disability. If the grievor suffers from alcoholism the Company must accommodate that disability to the point of undue hardship.

The Union presented material that highlights the steps that the grievor has taken since the July 13, 2014 incident in support of the grievor's reinstatement, subject to conditions. The Union also relies on **CROA&DR** cases **2716, 4143, 4059,** and **4094, 4328, 4297** and **4375** in support of its position.

The Company emphasizes that the grievor put himself, his crew and the public at large at serious risk. The Company does not accept that the documents submitted shortly before the hearing and presented at the hearing provide evidence that the grievor suffers from a disability such that the duty to accommodate is triggered. The Company relies on **CROA&DR 4352**, and takes the position that the documentation produced by the Union in support of the grievor's reinstatement is "scant" and falls short of the "clear and compelling evidence" referred to in the jurisprudence.

The Company submits, as it did in **CROA&DR 4375**, that the fact that the grievor did not report his "problem" and seek assistance until after having been found in violation of Rule G, is self-serving. (In that case the grievor was reinstated with conditions on the basis of the material before Arbitrator Silverman). Moreover, the Company highlights the grievor's relatively few years of service, which it suggests I should consider in this case.

The Company also directed me to **CROA&DR 4339** (there was no disability alleged in that case) as well as **SHP 530** – the case in which Arbitrator Picher reviewed the Company's comprehensive "Policy to Prevent Workplace Alcohol and Drug Problems." The Company submits that the reduction or removal of the griever's discharge to something less, would run counter to **SHP 530**, trivializing the seriousness of the grievor's misconduct and would be inconsistent with the Company's commitment and responsibility to safety.

Though admittedly unfortunate and less than ideal, I am not particularly surprised that the grievor took no action concerning his drinking problem until the point of discharge. That is not in and of itself a basis upon which to disqualify the grievor from reinstatement if he has a disability for which he is taking remedial steps. As articulated in **CROA&DR 2716** by Arbitrator Picher in 1996:

> Both legislation in Canada, such as the ***Canadian Human Rights Code***, and an extensive body of arbitrary 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.

I have carefully reviewed the material provided by the Union, largely gathered by the grievor, which speaks to the strides he has made in gaining control of his addictive condition - alcoholism. I am unable to accept, based on the material before me that the grievor does not suffer from alcoholism. Further, I am persuaded, that it "clearly and

compellingly" demonstrates that he has made substantial strides in gaining control of his alcoholism. This is one of those cases where it took a most serious incident for the grievor to appreciate the severity of his "problem" and to take the significant and life-altering steps to address it.

Immediately after the incident on July 13, 2014, the grievor, through a counsellor obtained a referral to a 28-day in-patient treatment program for people suffering from addictions. He was admitted to that program at the end of August 24, 2014, was treated by health professionals who specialize in addictions throughout the program, and he completed it on September 25, 2014. The grievor had begun to attend Alcoholics Anonymous ("AA") meetings prior to his admission and he has attended at the aftercare counselling appointments set out in the discharge treatment plan from the facility. The grievor's AA sponsor has confirmed the grievor's regular attendance at AA meetings three to four times per week, and his commitment to his sobriety. The grievor has more recently begun sponsoring another new member in AA. Many letters before me speak to the grievor's sobriety. Finally, it is apparent from the reference provided by Mobil Grain Ltd., a short line railroad where the grievor was able to obtain work for several months as a locomotive engineer after his completion of the in-patient treatment program, that the grievor disclosed his condition to that employer, where he was "watched very closely by management and other crew members." There was no indication from Mobil Grain Ltd. of any relapse by the grievor.

CROA&DR 4352, relied on by the Company, was a case where a Conductor was terminated for breaching his Continuing Employment Agreement. He had entered into a Relapse Prevention Agreement after self-reporting a dependency to prescription painkillers. Approximately five months into that agreement the results of a controlled substance test (a hair sample) revealed oxycodone in his system. As a result the Conductor signed a Continuing Employment agreement and another Relapse Prevention Agreement. Two months later another hair test revealed oxycodone in his system. Despite the test, the grievor denied that he had used narcotics for over a year. He was going to investigate how it could be that oxycodone could still have been in his system. Seven months later, the grievor produced the results of a negative hair sample test. Arbitrator Silverman did not find the evidence of that hair sample test to be "clear and compelling evidence" demonstrating that the grievor had made substantial strides in gaining control of his addiction. The grievance was denied. Neither the facts nor material before me are similar to that before Arbitrator Silverman.

I have no difficulty finding that the duty to accommodate applies to the grievor in this case because he suffers from a disability - alcoholism. Therefore, he is entitled to the protections afforded people with disabilities under the *CHRA*. Further, I am persuaded that the grievor has made substantial strides in bringing his addiction under control. The Company has not accommodated the grievor to the point of undue hardship. It has not accommodated him at all. The duty to accommodate to the point of undue hardship extends to all employees regardless of years of service.

The Company's interests and its duties referenced in **SHP 530** can be protected in this case by fashioning terms to protect the Company against a relapse or a reoccurrence. I am satisfied, on the evidence before me that it is appropriate to give the grievor a chance to demonstrate his ability to be a safe and productive LE in control of his alcohol addiction.

Accordingly, the grievance is allowed in part. The 90-day suspension stands. I direct that the grievor be reinstated into his employment, without loss of seniority but without compensation for any wages and benefits lost. He is returned subject to the following conditions:

1. The grievor shall not be returned to work until such time as he is confirmed by the Company's medical officer ("CMO") to be physically fit to work, including any addiction problems assessment which the CMO deems appropriate that the grievor be made subject to;

2. Upon being confirmed fit to return to work by the CMO, the grievor shall be subject to the following conditions for a period of 2 years:

   a) He shall abstain from the consumption of alcohol or drugs;

   b) He shall be subject to random, unannounced drug and alcohol testing, to be administered in a non-abusive fashion.

   c) He shall attend regular AA meetings;

   d) He shall engage in such periodic contact and follow-up with the EFAP program as the parties may agree is appropriate, and failing their agreement as shall be determined by the Arbitrator.

e) Following the expiry of the 2 years referenced above, the CMO will determine if an extension period is appropriate. If the Union is not in agreement with that determination, the Arbitrator shall determine the matter.

f) If the grievor fails to comply with the conditions of reinstatement, the grievor shall be immediately liable to discharge, subject only to the Union's right to file a grievance challenging that the grievor failed to comply.

I remain seized with respect to the conditions imposed.

April 27, 2015

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CHRISTINE SCHMIDT
ARBITRATOR