

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4422

Heard in Calgary, November 10, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Dismissal of Mr. Z.

JOINT STATEMENT OF ISSUE:

On December 5, 2014, the grievor, was issued three 104 Forms. The first informed him that he was assessed with 20 demerits for an unauthorized absence on November 11, 2014, the second informed him that he was assessed with thirty demerits for unauthorized absences of November 25 and 26, 2014, and the third informed him that he was dismissed for an accumulation of demerits. The matter was grieved.

At the investigation in the case, a letter was entered that was written by a Company EFAP representative who said that there was "no doubt" in his mind that the grievor was, for some time, clinically depressed and in need of treatment. The EFAP Rep also said he was "pleased to hear that (the grievor's) doctor (was) in agreement with this diagnosis and had, in fact, facilitated (the grievor's) application to Manulife for a medical leave related to the diagnosis of Depression and Anxiety.

The grievor's absences from work were undeniably related to his mental health problems. On November 26, 2014, one of the days absent for which he was ultimately dismissed, the grievor actually met with EFAP representative Mac Horsburgh.

The Company has completely failed in its duty to accommodate this disabled and very long service employee (service date August 4, 1987). His dismissal was unfair and unwarranted.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) G. Doherty

(SGD.) D. Cote for M. Becker

Vice President

Assistant Vice President Labour Relations

There appeared on behalf of the Company:

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| L. Smeltzer | – Officer Labour Relations, Calgary |
| J. Bairaktaris | – Director Labour Relations, Calgary |
| B. Medd | – Manager Labour Relations, Calgary |
| T. Mashita | – Senior Director Engineering Works, Winnipeg |

And on behalf of the Union:

- | | |
|------------|--------------------------|
| G. Doherty | – Vice President, Ottawa |
| D. Brown | – Counsel, Ottawa |

AWARD OF THE ARBITRATOR

The grievor was discharged for accumulation of demerits. The accumulation was as a result of twenty and thirty demerits assessed for occasions of unauthorized absence. At the time of his dismissal the grievor had twenty-seven years of service with the Company, most recently on a utility crew. The Union submits that the grievor suffers from a disability and that the Company has breached its duty under the *Canadian Human Rights Act* by its failure to accommodate.

Although the grievor has been assessed disciplinary penalties in the past for unauthorized absences, the specific events giving rise to the issuance of the penalties being grieved in this case began in June 2014. At that time the grievor was serving a

sixty day suspension for an unauthorized absence from June 10-19, 2014. When that suspension was assessed, the grievor's record stood at forty demerits. In August 2014 the Company met with the grievor and his Union representative to advise him that his attendance problems were serious and that additional infractions would lead to further discipline. The grievor did not mention a disability or need for accommodation at this meeting.

On November 11, 2014 the grievor once again missed his scheduled shift and did not contact anyone until half way through his shift to advise that he was not coming in and that he had been confused about his crew's holiday schedule. When asked whether he was familiar with the Company EFAP program, the grievor responded that he was.

Again on November 25 and 26, 2014, the grievor failed to report for his scheduled day of work and did not call his supervisor or anyone from the Company to say that he would be absent or the reasons for his absence.

An investigation meeting was held on December 2, 2014 at which time the grievor indicated that he met with a social worker at the EFAP on November 26, 2014, and that he had also met with his doctor. A letter from the social worker dated December 2, 2014 states that he had met with the grievor twice. The social worker said that the grievor was depressed; a condition that the grievor confirmed at the December 2, 2014 meeting. The Company says that this letter does not constitute medical

documentation sufficient to satisfy its requirements. To date it is the only documentation that the grievor has produced to substantiate his disability.

On December 5, 2014, the Company issued twenty demerits for the November 11, 2014 absence, thirty demerits for the November 25 and 26, 2014 absences and discharged the grievor for accumulation of demerits.

After his discharge, the grievor applied to Manulife for short term disability benefits, but his claim was denied. It is probable that the denial was because the grievor was no longer an employee at the time he made the application for benefits.

The Company has consistently taken the position that it does not have sufficient medical documentation to substantiate the grievor's claim. The Union contends that it was not reasonable for the Company to discharge the grievor and that notwithstanding the Company's request for additional medical documentation, it had enough information to have initiated the accommodation process.

The Company relies on **CROA&DR 2656** where a discharge was upheld by this Office where a grievor failed to regularly attend work over a period of several years. The Arbitrator found that the grievor had not demonstrated that she could sustain a reasonable level of attendance. I note however that **CROA&DR 2656** was not a case where a medical disability or condition contributed to the absenteeism, and furthermore that the absences in that case spanned a six year period. By comparison, in the instant case there is evidence before me that the absences are disability related. Moreover,

the grievor has had substantial periods in his twenty-seven year history with the Company when he has not had any attendance problems (1987-2001, 2001-2004, 2007-2012, 2012-2014).

The Company has a duty to accommodate the grievor's disability. However, to the date of hearing, the grievor has not provided medical documentation, other than the December 2, 2014 note from the social worker, to substantiate that his absences. There was not any medical evidence concerning how long the grievor might need to be off, any work restrictions that might apply or what steps the Company needed to take to accommodate his disability.

The Union seeks reinstatement and relies on **(CROA&DR 3799, 3859, 3804, 4131 and 4132, 4184)**. It also seeks an order of compensation and relies on **CROA&DR 4131, 4132**.

At the time the Company terminated the grievor it knew that he had seen a social worker who had diagnosed him with depression and it knew that the grievor said he suffered from depression. The Company was not satisfied with the medical documentation presented. However, the limited information the Company did have, from a social worker and from the grievor himself, did make out an arguable claim that he suffered from a disability. It did not warrant the assessment of demerit points and the subsequent dismissal for accumulation. The grievor is a long service employee who

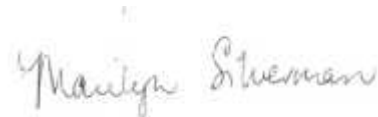
advised the Company that he had a disability. On these facts, I find that the issuance of demerits was not justified and the grievor is entitled to be reinstated.

However, as there is no medical or other evidence, to suggest that the grievor is or was able to provide regular and sustained attendance from the period of his discharge, an award of compensation is not warranted.

Accordingly, the grievance is allowed in part. I order that the grievor be reinstated to employment without loss of seniority and benefits but without compensation. Prior to being returned to service, the grievor must provide the Company with satisfactory medical documentation as to his fitness to return to work, detailing any accommodation that may be required. If the grievor cannot now return to work due to disability, satisfactory medical documentation is to be provided to substantiate his continued absence, and if possible, to estimate when he will be able to return to the workplace.

As the grievor's absence was disability related, the fifty demerits assessed are to be removed from his record.

December 4, 2015



**MARILYN SILVERMAN
ARBITRATOR**