CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4527

Heard in Montreal, January 10, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of a discharge to Conductor Z. Cook of Winnipeg, Manitoba, for "your violation of CN's Drug and Alcohol Policy on January 20, 2015, while working the 15:55 Transcona Yard."

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On January 20, 2015, Mr. Cook was working in Winnipeg's Transcona Yard when he was involved in a derailment incident, and subsequently tested positive for the presence of, and being under the influence of marijuana while on duty.

The Company conducted an investigation of the incident and determined that Conductor Cook had violated CN's Drug and Alcohol Policy and subsequently assessed him with a discharge.

The Union contended that the discharge was unwarranted under the circumstances, and requested that Mr. Cook be afforded every available mean of assistance to deal with this issue, and that he be returned to work.

The Company disagrees with the Union's contentions.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.)	**(SGD.) D. Brodie for K. Madigan**
GENERAL CHAIRMAN	Vice President, Human Resources

There appeared on behalf of the Company:

D. Houle	– Labour Relations Associate, Edmonton
K. Morris	– Senior Manager Labour Relations, Edmonton
J. Boychuk	– General Manager, Winnipeg
C. Michelucci	– Director Labour Relations, Montreal
S. Roch	– Manager Labour Relations, Montreal
L. Williams	– Manager Labour Relations, Toronto

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto

M. Biggar – Counsel, Caley Wray, Toronto
J. Thorbjornsen – Vice General Chairman, Edmonton

AWARD OF THE ARBITRATOR

As a preliminary matter and at the request of the Union, I hereby confirm that, the day before the hearing, the Union asked for a postponement since it could not join the Grievor. It alleged that the Grievor could not be reached since December 23rd, 2015, and that his absence at the hearing could cause him prejudice. The Employer objected to the postponement.

Appendix "C" of the CROA&DR Memorandum of Agreement reads, in part, that:

> "In all but the most extraordinary of circumstances, postponements or adjournments will not be granted except with the agreement of both parties to a dispute. All requests for postponement should be made in writing, with a copy sent to the other party to the dispute."

The circumstances did not qualify as "the most extraordinary" and, indeed, the Grievor having been dismissed almost two years ago, the parties had ample time to communicate evidence and arguments to each other during that time. The Union knew since October 2016 that the hearing would be held in December 2016 or January 2017. Also noteworthy is that grievers do not usually bring any new information that has not already been presented in the briefs. As such, I denied the Union's request. The Grievor had to stay available for the hearing of his case and he failed to do so, the responsibility is his.

As for the grievance itself, it concerns the appeal of Conductor Zachary Cook's dismissal for his violation of CN's Drug and Alcohol Policy on January 20, 2015, while working at the Transcona Yard.

Mr. Cook was hired by CN Rail on February 17, 2014, as a Conductor Trainee and was qualified on July 26, 2014 as a Conductor. At the time of dismissal, he had been with the Company for some 11 months and had a discipline record of 10 demerits and one written reprimand.

On January 20, 2015, Mr. Cook was working as a Foreman at the Transcona Beltpack Yard. An hour and thirty minutes into his shift, the Grievor and his co-worker were involved in a derailment that damaged a couple of cars. Because the incident seemed to have been caused by an error in judgement, Mr. Cook and his co-worker were required to undergo post-incident testing for the presence of drugs and/or alcohol.

The Grievor provided a urine sample which tested non-negative in a point of collection test and thus had to also provide an oral fluid sample. Both samples were sent to Driver Check, Physical Exams and Drug Testing for further and more detailed analysis.

On January 26, the results came back, the Grievor's samples tested positive and indicated recent use of marijuana and impairment at the time of the incident.

Upon receiving the results, the Company tried to schedule an employee statement for late January. However, because the Grievor was not available, the investigation was delayed until April 10, 2015. Following the investigation, the Company discharged Mr. Cook on April 16 for his alleged violation of CN's *Policy to Prevent Workplace Alcohol & Drug Problems*, based on the positive tests collected after the January 20th, 2015 incident.

The evidence shows that during the April investigation, Mr. Cook said that he was an occasional user of drugs:

> "Q17: Mr. Cook, how do you explain the presence of illegal drugs in your drug tests?
>
> A17: During the morning of the incident I smoked Marijuana at approximately 0800, it was a bad decision that I wholeheartedly regret.
>
> Q18: Mr. Cook, previous to that time, what other illegal drugs did you use and how much?
>
> A18: None.
>
> Q19: How often did you use illegal drugs?
>
> A19: Occasionally"

A week after the incident, the Grievor applied for Great West Life Short Term Disability benefits. Great West Life confirmed that no benefits were granted to him since no medical documentation was filed to support his claim.

Mr. Cook also contacted the Company's Employee and Family Assistance Program (hereinafter: "EFAP"). On January 26, 2015, the Grievor had a meeting with a

counselor from Shepell.fgi, Ms. Shawna Sloane-Seale. After the meeting, Ms. Sloane-Seale indicated that Mr. Cook may have a substance abuse issue and thus recommended that CN's Occupational Health Services further assess Mr. Cook.

He was then referred to the River Point Centre, which provides addictions treatment and public education services related to alcohol, drugs and gambling addictions. In the meantime, the Grievor attended the Employee Assistance Program (hereinafter: "EAP") again on February 2.

On February 27, 2015, Ms. Scarlett Solomon, a counselor for the River Point Centre, assessed Mr. Cook's case. The report indicates that "No services [were] accessed" by the Grievor in the Assessment Outcome section. Additionally, Ms. Solomon, wrote in her report that:

> "The client will complete his counselling sessions with his EAP appointed counsellor. If client is still facing challenges with his substance use he will be appropriate for AFM program. […] He has AFM's contact information to schedule."

Following this meeting, Mr. Cook had two more sessions with the EAP, one on March 19 and a final one on April 9 of 2015.

On June 11, 2015, the Union filed a Step III grievance to appeal the Grievor's dismissal. In its brief, the Union argues that the Grievor was honest and forthright during the investigation, asserts that he suffers from a substance abuse problem and that, as

such, the Company should reinstate, accommodate and provide the Grievor with assistance to deal with his disability.

The facts are not in dispute and the whole of the grievance rests on a single question: did Mr. Cook have a substance abuse problem that can be considered a disability under the *Charter of Rights* when the events of January 20 occurred? If so, was the infraction committed linked to the alleged disability?

The burden of proof rests on the Union's shoulders. It must demonstrate, on the balance of probabilities, that the Grievor had indeed a disability and that there is a connexion – or causal link – between the disability and the violation that incurred discipline.[1]

The Employer asserts that in order to establish the existence of a disability, expert medical evidence has to be submitted by the Union. While it is true that a physician's diagnosis weighs heavily in the appreciation of a grievor's condition, some nuances must be made.

A review of the jurisprudence shows that arbitrators do not always require expert medical evidence to conclude that a disability does afflict a grievor. However, if no such

[1] *Health Employers Assn. of British Columbia* v. *B.C.N.U.*, 2006 BCCA 57, 2006 Carswell BC 292; and AH638

expert opinion is presented, other medical evidence must make the case for a disability quite compelling.

In *Prince Albert Parkland Health Region* and *CUPE, Local 4777 (Storey), Re*[2], the majority of the board of arbitration presented a number of decisions where expert medical evidence was required by arbitrators and others where it was not. The board explains that, indeed, the need for expert evidence will depend on the context and can sometimes be required.

In another decision, *Toronto (City)* v. *CUPE, Local 79,* arbitrator Goodfellow writes that:

> [23] A review of the cases reveals that questions of causality and the need for medical evidence can arise in two contexts. The first is in relation to an argument that behaviour that would otherwise be disciplinable is rendered non-disciplinable because of a disability. The second is in connection with a mitigation argument. As we shall see, I have both arguments here.
>
> [24] At least in the first of these contexts, what is expressed is the need for a "causal link", "connection" or "nexus" between the established disability and the otherwise disciplinable misconduct. (TRW Canada Ltd., supra, also uses the phrase "proximate cause".) The question is how is that causal link to be established -- on the basis of what evidence? Is there a requirement for medical evidence beyond that which provided for the finding of "disability" in the first place? If so, how directly must that evidence speak to the question? Must there be medical evidence that addresses the connection specifically, i.e. in relation to the grievor's own actions or inactions, or is it enough if there is evidence that simply refers (e.g. after the fact) to the kind of behaviour that is in issue? Is a simple diagnosis with an accompanying description of symptoms sufficient or is even that not required?

[2] [2016], (Saskatchewan Arbitration)

> [25] Perhaps not surprisingly, there appears to be no "one-size fits all" answer to these questions. Different arbitrators have taken different approaches, and that is no doubt at least in part due to the varieties of behaviour sought to be explained. What does appear clear, however, is that there is a distinct arbitral preference for medical evidence that, if not addressing the question directly, at least provides something beyond the basic diagnosis from which that connection can reasonably be drawn. Without such evidence, in my opinion, the Union runs the substantial risk of a finding that the onus has not been met -- a risk that increases, not decreases, with the scope and extent of the behaviour that is in issue." [3] [Emphasis added]

In a recent decision, the Superior Court of Quebec has concluded that an arbitrator who considered a grievor's alcoholism to be a disability without expert medical opinion was wrong. The judge explained that without said expert evidence, the arbitrator could not conclude that the grievor suffered from a disability. He further added that the grievor's visit to a help center did not suffice to prove his disability and that such a visit did not qualify as medical evidence.[4]

In AH 638, arbitrator Schmidt wrote that:

> "In order for this grievance to succeed, the Union must establish on the face of the undisputed facts, that the grievor was not culpable for his conduct because of his disability or that the penalty of discharge is too severe, taking into account any mitigating circumstances. The Union accepts that arbitrators require that the medical evidence proffered must substantiate a link between the misconduct at issue and the medical condition."

Concerning the present case, there is simply not enough evidence to allow the conclusion that Mr. Cook was indeed suffering from a disability at the time of the

[3] [2014] O.L.A.A. No 16, (Ontario Arbitration)
[4] Montréal (Ville de) c. Morin, 2016 QCCS 2101, para. 20 to 23

incident. While the assessment of a disability does not always require expert medical evidence, it requires more than what was adduced before this Court.

To briefly summarize, Mr. Cook was evaluated on January 26 by the Shepell.fgi counsellor, who referred him to OHS for *further* assessment. The Grievor then visited the EAP three more times and no clear, convincing, diagnosis was obtained to attest to his alleged disability. Ms. Solomon of the AFM center wrote that "If client is still facing challenges with his *substance use* he will be appropriate for AFM program" (emphasis added). With respect to the contrary opinion, "facing challenges" with substance use does not establish the existence of a disability. Mr. Cook himself merely stated that he was an occasional user during the Company's investigation.

It is not enough to simply claim that one may have substance abuse or is facing challenges with substance abuse and that one visited the EAP a few times. As arbitrator H. Kates explained in **CROA&DR 1341**:

> "[…] in order for an employee to take proper advantage of the Company's EAP Program, that employee must come forward and voluntarily submit to it prior to any incident that may give rise to a legitimate disciplinary response on the employer's part. <u>The EAP Program is not designed to be used as a "shield" for a breach of Rule 'G' after the fact.</u> At that time the threat to the safety of the company's railway operations has occurred and such risks should not be seen to be condoned by a belated recourse to the Company's EAP Program." [Emphasis added]

By consuming marijuana before going to work, Mr. Cook committed an offense deserving severe discipline, up to and including discharge[5]. Drug use cannot be tolerated in the extremely safety sensitive railway environment. Moreover, Mr. Cook was a short-term employee, having just under a year of experience at the time of the incident, and had already been assessed 10 demerits and a written reprimand.

Considering the absence of mitigating factors and the gravity of the infraction, the decision of CN Rail to discharge the Grievor was entirely reasonable.

Thus, for the above-mentioned reasons, the grievance is dismissed.

January 23, 2017

MAUREEN FLYNN
ARBITRATOR

[5] See: CROA&DR 3818 and CROA&DR 3699