CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4540

Heard in Calgary, February 9, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer Grant Fahlman of Saskatoon, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Fahlman was dismissed for the following reasons, Please be advised, you have been DISMISSED from company service for the following reasons: *As you have breached the bond of trust necessary for continued employment with the Company as evidenced by your admitted use of alcohol, an intoxicant, at the Wynyard hotel bar on Jan 22, 2016 when you were an occupant of the Wynyard bunkhouse, a facility furnished by the Company, while employed as a Locomotive Engineer in Sutherland, SK. A violation of the Rule Book for Train and Engine Employee, Section 2.2 (d, i)."*

The Union contends the Company has not met its burden of proof to establish culpable behavior that would justify the ultimate penalty of dismissal. The investigation revealed the Company produced no evidence that would support their position that Engineer Fahlman breached the bond of trust. As a result of the lack of evidence, the Union contends the dismissal is unjustified, unwarranted and extreme in all circumstances. Further, the Company failed to produce any evidence that would indicate Engineer Fahlman was impaired in anyway on January 22, 2016 at Wynyard. Mr. Fahlman did not use or possess any alcohol while occupying the Company supplied facility.

The Union also contends Engineer Fahlman not only worked his return trip to Saskatoon without incident but continued to work for next several days until he was removed from service. The Union contends that his continued employment was not in jeopardy and the Company failed to provide any evidence to support his removal from service in pursuant to Article 23.05 of the Collective Agreement.

The Union requests that the discipline imposed upon Engineer Fahlman in this matter be removed from his record and that he be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) G. Edwards **(SGD.)**
General Chairman

There appeared on behalf of the Company:

L. Smeltzer	– Manager, Labour Relations, Calgary
C. Tsoi	– Labour Relations, Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
H. Makoski	– Senior Vice General Chairman, Calgary
G. Lawrenson	– Vice General Chairman, Calgary
D. Spence	– Local Chairman, Saskatoon
G. Fahlman	– Grievor, Saskatoon

AWARD OF THE ARBITRATOR

Grant Fahlman (the "Grievor") has been an employee at the CPR since January 30, 1995. He qualified as a Conductor and was promoted to Locomotive Engineer in July 2008.

On January 22, 2016, he was on rest while an occupant of the CPR bunk house, a facility furnished by the Company, in Wynyard, Saskatchewan. He, and 3 other employees on his crew, had booked off on 8 hours rest which would expire that day at 22:00 hours. The Grievor was accordingly subject to be called for duty to unassigned service beginning at 00:01 hours on January 23, 2016. Over the course of that night, he repeatedly checked the train line-up and concluded that notwithstanding the fact he was to be available to be called for duty at 00.01, the earliest he could practically be called to operate a train would be 11:40 on January 23, 2016 on Train 517- 402.

He and his fellow employees went to the Wynyard bar at approximately 19:30 hours on January 22, 2016. According to the Grievor, he had a single drink of rye and

diet Pepsi at 20:00 hours and a second similar drink at 21:15 hours. Thereafter, he continued playing the VLT machines until approximately 23:00 hours at which time he left and walked back to the Wynyard bunk house. After conversing with other occupants of the bunk house, he fell asleep watching a movie and ultimately went to his bed at 02:00.

The following morning, the Grievor and his crew were ordered to Train 517-402 at 11:40. They operated the train from Wynyard to Sutherland and reported off duty at 16:05.

On January 29, 2016, the Grievor was informed that he was being held out of service and subsequently received a Notice of Investigation regarding his:

> "… conduct at the away-from-home terminal at Wynyard when off rest (sic), including events that occurred at the Wynyard bar on January 22, 2016 and events leading up to and including your return trip to Sutherland, Saskatchewan...on January 23, 2016."

After he reviewed the evidence – which included a statement from the waitress ("Ms. B") who had served him on the night in question - the Grievor contacted Ms. B. According to the Grievor he did so to enquire why he was being implicated in an incident that never happened.

The Grievor's recollections conflicts with the evidence of Ms. B. much hangs on this conflict. After a review of all the evidence, I have little difficulty in accepting the evidence of Ms. B where it conflicts with that of the Grievor (and, in some circumstances, the members of his crew given the motives alluded to by Arbitrator Flynn in **CROA&DR 4533***)*.

Ms. B recalls that she served the Grievor at least 2 large "*double*" drinks in a beer glass. In addition, she served him approximately 6 "*shots*". The Grievor, was familiar to her given that he had been at the bar on what she described as "*regular*" occasions. Although, in most instances, his attendance was mainly for food, on weekends he came in and drank. She remembered him because of his rudeness to the staff when he drank - both in the past and on that night. In fact, because of the Grievor's repeated rude behavior she took a photograph of him that night, a copy of which was entered into evidence (Ex. 5d). She took the photograph:

> "… because we have had problems with him in the past...coming in here and being rude to our staff...and I wanted to show it to my boss...to make sure she knew who...we were talking about...so the other girls knew which one we were talking about as well…".

She recollected that she "cut off" the Grievor, and another member of his crew, at approximately 00:30 hours on January 23 and they remained at the bar playing the VLTs until approximately 02:00. She recalls that when she cut them off, the Grievor "*threw a little bit of a tantrum*" and she consequently gave them an hour and a half to leave the bar. The tantrum that he threw was because he: "*...was just being rude and he didn't know why he was being cut off*". She was able to specifically recall the fact that the Grievor was drinking doubles and that (consistent with the Grievor's evidence) she did not serve him his first drink until approximately 21:30. However, she recalls that the Grievor, in addition to the doubles, drank "*lots of shots*".

The Grievor's position was to simply broadly refute (Q. 12 final paragraph) the evidence of Ms. B. This included, *inter alia,* his refutation that: he drank doubles; that he

had any additional "shots"; that he "*had been a problem in the Wynyard bar in the past*" caused problems in the bar in the past (other than sending his chicken wings back); that he "*had an attitude that night*"; that he was cut off from further drinking at 00:30 on January 23, 2016.

It is significant that the Grievor called Ms. B on January 29, 2016, after he had reviewed her statement. The exchange, at Q.132-138, reflects that the Grievor called the Wynyard bar and identified himself as a 21 year CP employee and that, according to Ms. B, he asked her not to say anything because "*CP was looking into the matter"*. Although he admits he made the call, he denied asking Ms. B not to say anything. Rather, he provided this explanation for making the call:

> "… *because I wanted to know why they were implicating us in some sort of incident which I knew never happened*" (Q. 133).

Additionally, at the end of his interview, he felt it necessary to gratuitously point out that he knew Ms. B. was in a relationship with another employee of CP Rail and that she likely got his name through that connection. He reiterates that he had not done any of the things she stated - other than have a couple of drinks - and then he adds:

> *"... I can only speculate why she has put … (us)… through this hell but I want to believe it is a case of mistaken identity though can't (sic) get over the fact that it is somehow a malicious act. I don't think she realizes the repercussions of her actions".*

A review of the statements of both Ms. B. and the Grievor make it easily apparent that Ms. B's evidence is to be preferred given the nature of the same. The evidence of the Grievor, taken as a whole, is simply not credible. In addition to the comments of the

arbitrator in **CROA&DR 4533** which relates to an obvious self interest in the Grievor's denials, I also accept the principles enunciated in *Faryna vs. Chorney* (*1952) 2 DLR 324* relative to assessing the evidence of a witness:

> "... The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...."

Keeping the above in mind, I have no difficulty in concluding that the Grievor's statements that Ms. B's recollection must be a case of "*mistake in identity*"; his denial of the amount he drank; his denial that he "had an attitude" that night (notwithstanding that she took a photograph of him precisely because of his conduct); his denial of the period of time that he was at the bar; his denial that he was "cut off" and the time that it occurred; his improbable explanation for the call to Ms. B; and, *inter alia,* his denial that he did not request that she not inform him are, both singularly and taken together, out of harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

On the other hand, I find the evidence of Ms. B credible and preferable in that it is in harmony with the preponderance of probabilities as expressed in *Faryna v. Chorney (supra)*.

In the result, I conclude that the Grievor was, in fact, drinking up to the point where he was "*cut off*" by Ms. B. at approximately 00:30 hours on January 23, 2016.

Was the Grievor's conduct deserving of discipline

The provisions of the *Rule Book for Train and Engine Employees*, Section 2.2(d) provides as follows:

> "It is prohibited to:
> (i) use intoxicants or narcotics while subject to duty or to possess or use such while on duty or when an occupant of facilities furnished by, or which will be paid for by the company."

The Union argued that the Grievor was not consuming alcohol while occupying the facilities furnished by the Company and that, in all events, he was not impaired. However, it appears from a reading of Section 2.2(d) that the prohibition is not confined to either being impaired or otherwise consuming an intoxicant within a Company furnished facility. It suggests that being an occupant of - as opposed to "occupying" - the premises when the intoxicant is consumed, is prohibited and is sufficient to bring the section into play.

That said, an interpretation of that aspect of Section 2.2(d) is not required for my purposes here in that the section makes it clear that the prohibition specifically extends to periods where an employee is "*subject to duty*". By his own admission, the Grievor was subject to duty at 00.01 hours on January 23, 2016. I am satisfied that the evidence establishes that he was consuming intoxicants after that point in time and was only "*cut off*" from consuming any more at 00:30 on January 23, 2016. In the result, he is in breach of the Section 2.2 and clearly subject to discipline.

The Company imposed a discipline of dismissal. The issue left for me to decide is whether or not the discipline imposed is reasonable in all of the circumstances.

Was the discipline imposed reasonable in all the circumstances?

As Arbitrator Piche stated in ***CROA&DR 3417***, it is:

> "Well established that the use of intoxicants and narcotics in the safety sensitive environs of a railway is clearly a serious disciplinary offence, generally inconsistent with continued employment."

Ordinarily, following that reasoning, the Grievor's conduct would result in his dismissal. However, there are mitigating circumstances in this case that militate against an outright dismissal. While it does not provide a reasonable excuse for his conduct, it is apparent that the Grievor spent a considerable amount of time ensuring that he would not, in fact, be called to operate a train until at least 11:40 on January 23, 2016. There was no suggestion that the Grievor reported for service or operated the train in an impaired state. Again, although neither an excuse nor an exception to the prohibition contained in Section 2.2, it is reasonable to assume that the alcohol he had consumed up to 00:30 would not have left him impaired when operating the train at 11:40.

The Grievor has been an employee of the Company since 1995. While he has a disciplinary record, none of the discipline imposed related to the kind of conduct set out in the current matter. In the circumstances here, his length of service; his record; and his belief that he would not likely be required to operate a train until 11:40 the following day are mitigating factors which must be considered. Given the circumstances and his

lengthy service I believe that a suspension would serve the Employer`s purposes and be a reasonable disciplinary response.

The grievance is allowed in part. The Grievor is to be reinstated subject to the conditions set out below.

Having concluded that the Grievor should be reinstated, it should be made clear that this award is not to be taken as a licence for employees to determine, on their own, when they are "*subject to duty*" and whether or not it is "safe" for them to use intoxicants notwithstanding the specific provisions of Section 2.2.

While I might well have been moved to impose lesser discipline, the Grievor should be aware that his own conduct and statements convinced me otherwise. In arriving at the conditions and the length of an appropriate suspension I have taken into consideration, *inter alia,* the following: the Grievor's abject denial of his conduct; its premeditated nature; his failure to accept responsibility; his attempt to discredit Ms. B. ("Mistaken identity" Q.106) and impugn her motives and reputation ("*She's lying or she's framing me*" Q.112); and, his post offense conduct of attempting to interfere with Ms. B's evidence by phoning her and asking her to "*keep it quiet*" and then denying that he actually did so.

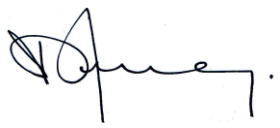
Furthermore, while I accept the logic of the arbitrator in **CROA&DR 4399** that conditions ought not to be imposed on a grievor in the absence of evidence or law relating to substance dependence, the Grievor here suggested on his own (Q. 140) that he would:

> "…like to provide a urine sample or any other tests deemed necessary by the company. …"

Accordingly, based on all of the above, the Grievor shall be reinstated without loss of seniority but without compensation for past wages or benefits and subject to the following conditions:

> a. That the Grievor submit to a safety critical comprehensive medical examination, including a return to duty substance test, and any other medical assessment deemed necessary under the terms and conditions directed by the Occupational Health Services Department (OHS).
>
> b. That the Grievor be determined to be medically fit to return to service in his former Safety Critical position, by the Chief Medical Officer or his designate.

I shall retain jurisdiction with respect to the implementation or interpretation of this award.



May 1, 2017

RICHARD I. HORNUNG
ARBITRATOR