CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4675

Heard in Calgary, March 8, 2019

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE – MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

The dismissal of Extra Gang Foreman K. Mardon of Mission, British Columbia.

THE JOINT STATEMENT OF ISSUE:

On March 13, 2018, the grievor, Mr. K. Mardon, was dismissed from Company Service. The form 104 reads as follows: Please be advised that you have been dismissed from Company Service for:

> **(i)** Your absence from duty without authorization during designated work hours on February 16, 2018,
> **(ii)** Your failure as a Foreman to ensure an employee under your charge worked in accordance with all applicable rules and regulations as evidenced by said employee's absence from duty without authorization during designated work hours on February 16, 2018 and failure to report same to your supervisor and
> **(iii)** For your submission of an inaccurate time claim for February 16, 2018, on said employee's behalf while employed as a Extra Gang Foreman in Mission, BC.

All this, according to the Company, constituted a violation of the grievor's January, 29 2018 Last Chance Agreement.

The Union objected to the dismissal and a grievance was filed.

Union's Position:

The Union objects to the discipline assessed to Mr. Mardon for the following reasons:

1) Mitigating factors (including illness) were not sufficiently taken into account by the Company;
2) The grievor was open and made no attempt to defraud;
3) The grievor violated neither the named SPC rules nor his Last Chance Agreement;
4) The discipline assessed was excessive and unwarranted.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all losses incurred as a result of this matter.

Company's Position:

The Company maintains that dismissal was appropriate with regard to grievor's culpability for the incidents that took place on February 16, 2018. The grievor failed to report his early departure (absence) from the workplace on February 16, 2018. Further, the grievor failed to effectively complete his duties as an Extra Gang Foreman on February 16, 2018 by allowing the employee under his charge to violate the SPC Rules for Engineering Employees. Moreover, all of this is a direct violation of the grievor's Last Chance Agreement dated January 29, 2018.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.) W. McMillan**
President	Officer, Labour Relations

There appeared on behalf of the Company:

W. McMillan	– Labour Relations, Officer, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary
D. Zurbuchan	– Labour Relations Manager, Calgary

And on behalf of the Union:

H. Helfenbein	– Vice President, Ottawa
D. Brown	– Counsel, Ottawa
G. Doherty	– President, Ottawa

AWARD OF THE ARBITRATOR

For the reasons provided in the Joint Statement of Issue, Extra Gang Foreman, Kyle Mardon, the Grievor, was dismissed from Company service on March 13, 2018.

The Grievor had been previously dismissed from the Company on November 23, 2017 for sleeping on duty. On January 29, 2018 he was reinstated pursuant to a Last Chance Agreement (Company Exhibits; Tab 4).

On February 16, 2018, the Grievor was the Extra Gang Foreman in charge of a fellow employee Chad Brown. Their shift began on February 15, 2018 at 19:00 and was scheduled to end at 06:25 on February 16, 2018. Chad Brown left work at 03:45 on February 16, 2018. The Grievor left his shift at 05:02.

After they left, Roy O'Handley, their supervisor, while dealing with a Trouble Call at 04:40, sent a crew to the tool house to enlist the help of the Grievor and Brown. The crew arrived at 05:00 and found the shed locked with no one around and reported the same to O'Handley (Company Exhibit; Tab 11). O'Handley called the Grievor at 11:58 and advised him that two employees went to the tool house and found no one there. The Grievor told him that "*he was there*". When O'Handley explained further that the gate was locked; there were no vehicles in the compound; and, the tool house was empty, the Grievor allowed that Mr. Brown left early but that he did not.

Following an investigation, the Company determined that the conduct of the Grievor in leaving work early; allowing Mr. Brown to leave earlier; and, filling out a time-sheet which did not accurately reflect the time that Brown worked, constituted a breach of the Rule Book for Maintenance of Way Employees SPC #41.

The Grievor's response to the three allegations are as follows:

1. Early Departure of Mr. Brown

The Company alleges that the Grievor, in allowing Mr. Brown to depart early, breached SPC #41, Section 3.1(a) in that a foreman is required to ensure that employees, under his charge, work "*safely and in accordance with this SPC and all applicable rules and regulations*". I accept the Union's argument that the departure of Mr. Brown did not represent a safety violation. Nevertheless, Section 3.1(a) requires that the Grievor ensure that employees abide by "*all applicable rules and regulations"*. I accept that, practically speaking, there was likely not much that the Grievor could have done to compel Mr. Brown

to stay, nevertheless he ought to have reported the absence of Mr. Brown to his Supervisor. That said, if this was the only issue I doubt the Company would have seen fit to exercise its rights under the Last Chance Agreement.

2. Time-sheets

The Company argues that the Grievor submitted an inaccurate time sheet for Brown. However, a review of the same (Company Exhibits; Tab 12) makes it apparent that the Grievor noted that Mr. Brown had left at 03:55. He explained that he anticipated the Supervisor would be alerted to the absence of Mr. Brown and make the appropriate adjustments. Even though the time sheet was completed after the Grievor's phone call with O'Handley, it is nevertheless clear that he alerted the Company of Brown's absence on the time sheet itself and his explanation is both plausible and reasonable in that regard. Accordingly, I cannot conclude that the Grievor's behaviour in that respect was culpable and deserving of discipline.

3. Absence from duty without authorization

During the investigation the Grievor raised, for the first time, the fact that he had intestinal problems and that he left early because he was "*in pain and severe gastrointestinal distress*" (Q. 16). He allowed that he suffered from the intestinal difficulties since April 24, 2017. However, as the Company points out, the Grievor - pursuant to the terms of the LCA - underwent a comprehensive medical examination within three weeks prior to his return to work on January 29, 2018. No evidence of

intestinal difficulties was noted at the time nor was there any reference by the Grievor which would lead to an examination of an intestinal complaint.

It is significant that in their initial telephone discussion the Grievor never told O'Handley that he had experienced intestinal difficulties or that he left work for that reason. Reference to this issue was only raised by the Grievor at the investigation stage. His failure to raise his alleged medical condition – as a reason for his early departure - when he first spoke to O'Handley, speaks volumes with respect to the veracity of his claim in that respect. I am not convinced, on balance, that the Grievor's condition required him to leave work early.

In all events, and irrespective of his reason for leaving, the undisputed evidence is that the Grievor did not call O'Handley for permission to leave work early or to report that he was sick. *SPC #41, Section 1.2 (a)(i)* directs that an employee may not, **without permission**, be absent from duties. In *UNA v. AHS (Hazell-Erezinger); [2015]* Arbitrator Wallace, in dismissing a discharge grievance, makes the following pertinent observation:

> *The basic rule, i.e. that employees must work their scheduled time and not leave work early without management permission, is so central to the employment relationship and so well-known and universally applied, that no formal rule is required…*

Having left work early, the Grievor was required to notify his supervisor that he was absenting himself from his duties. In this case his early departure was even more egregious in that, prior to the beginning of his shift, Brown and the Grievor were given specific instructions to remain at their work place until they were picked up having regard to a shortage of vehicles at the time. Irrespective of the reasons, he left work and did not

notify his supervisor; nor did he provide a credible reason for failing to do so. In the circumstances, his conduct in breaching *SPC #41, section 1.2 (a) (1)* was culpable and deserving of discipline.

Last Chance Agreement

The remaining issue is whether the Grievor's dismissal, pursuant to the terms of the Last Chance Agreement (LCA), is appropriate.

The application of a LCA depends on the language used by the parties in the agreement itself.

> *"Generally speaking… where a Last Chance Agreement limits the arbitrator to determining whether or not a breach of a condition has occurred, arbitrators will abide by that restriction. On the other hand, where it does not define or restrict the role of the arbitrator, or alternatively does so in vague terms, arbitrators will apply the just cause standard in determining whether or not an employee has been properly dismissed for a breach of the terms of the agreement... In CPC v CUPW [2002] C.L.A.D. 400, Arbitrator Outhouse, observes (at para 50):*
>
> > *"It is well settled that last chance agreements ought to be enforced by arbitrators in accordance with their terms. Any other approach would discourage the use of such agreements and is, therefore, to be avoided. Where last chance agreements restrict the arbitrator's jurisdiction to determining whether or not there has been a breach of condition, then arbitrators have generally abided by that restriction. On the other hand, where the last chance agreement doesn't expressly restrict the jurisdiction of the arbitrator, or does so only in ambiguous terms, then arbitrators fall back on the just cause standard but treat any significant breach of condition, if proven, as being highly persuasive on the just cause issue..."*
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> *(CPC v CUPW (Beisick); (2017) 818-16-00001; Hornung; p.6)*

The LCA (Company Exhibits; Tab 4) provides as follows:

> *Mr. Mardon shall strictly comply with all Company policies, procedures and work practices, including, without limitation:*
>
> *a. Canadian Rail Operating Rules*
> *b. The Rule Book for Engineering Employees*
> *c. Engineering Safety Rule Book*
> *d. SPC 41 M/W Rules and Instructions*
> *e. Dressed and Ready*
>
> *4. Any alleged violation of or failure to comply with any of the terms of this agreement will result in removal from service and an investigation.*
>
> *5. If, following a fair and impartial investigation, the Company determines that Mr. Mardon violated or failed to comply with any of the terms and conditions of this agreement:*
> *a. It shall be considered just cause for the termination of the employment of Mr. Mardon;*
> *b. The Company, in its sole discretion, may elect to dismiss Mr. Mardon from Company service or impose a lesser disciplinary penalty;*
> *c. Any grievance regarding the discipline assessed shall only be for the purpose of determining whether Mr. Mardon violated or failed to comply with the terms and conditions of this agreement; and*
> *d. The arbitrator in respect of any such grievance shall not have jurisdiction to substitute a lesser penalty for any discipline imposed if he or she finds that Mr. Mardon violated or failed to comply with any of the terms and conditions of this agreement.*

As stated in *Beiseck (supra p. 8*):

> *"… last chance agreements which restrict the arbitrator's jurisdiction to determining whether or not there has been a breach of conditions, ought to be enforced by arbitrators in accordance with their terms. These are sophisticated parties who negotiated a specific agreement to accomplish specific goals. … it is apparent that there is an obligation to carefully review the language of the Memorandum of Agreement and apply the agreement in a manner which fairly reflects the parties' intentions. To do otherwise, is antithetical to the larger labour relations purposes served in encouraging parties to resolve their disputes directly and undermines both the benefits and the effectiveness of their arriving at any disciplinary accommodations.*

In paragraphs 5(c) and (d) my jurisdiction is clearly restricted to determining whether the Grievor violated or failed to comply with the terms of the LCA. Equally, the LCA specifically sets out that if I find the Grievor failed to comply with it, I *"shall not have jurisdiction to substitute a lesser penalty for any discipline imposed".*

The Union initially raised the point that the LCA may be unreasonable because the compliance required is too broad, and without a time limit, and therefore compels the Grievor to adhere to a higher standard than other employees. I do not agree. The LCA's delineation of compliance obligations, in paragraphs *2(b) (i) – (v)* simply, enumerates the reasonable expectations and terms of the Grievor's continued employment with special emphasis given to *SPC M/W Rules*.

While the Union concedes that the absence of a reasonable operational time limit in the LCA does not, in and of itself, serve to invalidate the contract, it argues that it is one of the considerations to be addressed in determining the larger question of whether the Company's action in dismissing the Grievor was "*fair and measured*" and an "*objectively proper response to the events giving rise to the discipline*". Although I am given pause by the fact that the LCA is not time limited (and thereby, arguably, subjects the Grievor to the prospect of dismissal for any violation over an indefinite period of time) the duration of the LCA, and the occurrence of the discipline within the same, does not impact or vitiate the agreement in the circumstances here. Having regard to the fact that the offences committed by the Grievor occurred within three months following his signing

the LCA, it cannot be said that the Company's choice to dismiss, rather than impose a lesser discipline, was unreasonable or unfair.

The Union is a signatory to the contract. It does not take the position that the LCA should be disregarded or considered invalid. Rather, as indicated earlier, it argues that:

> *"… As with everything in a labour law context the actions of the Company must be fair and measured and that, even under an LCA, any discipline imposed must constitute an objectively proper response to the events given rise to the discipline." (para. 16)*

And, suggests that:

> *"…To put it another way, despite the fact that all three parties…signed the Grievor's LCA, it does not mean that the Company is thereby free to apply the LCA's provisions in a manner that it alone sees fit. Rather, it is submitted that, as in all situations, the Company's decisions are subject to the rule that disciplinary responses must be reasonable in the circumstances." (para. 17)*

Having been raised by the Union – even in the retreating fashion it was – I am compelled to address the issue.

A reading of Sections 4, 5 and 5(a) of the LCA clearly reflects the parties' intention that a proven breach of its terms would constitute "just cause" and clothe the Company with the primary, *prima facie,* right to terminate the Grievor's employment.

That said, Section 5(b) provides the Company with the further discretion:

> *"… to dismiss Mr. Mardon from Company service or impose a lesser disciplinary penalty".*

The Union asserts that, having inserted a clause that provides the discretion to impose a lesser penalty, the parties ascribed to the Company the transcending obligation

to exercise its discretion fairly and reasonably and apply the principles in *Wm Scott* in assessing just cause for the discipline imposed. While I understand the Union's submission, the primary consideration - as set out earlier in *Beiseck (supra)* - is to give voice to the intention of the parties which must be gleaned from the language they used in the context of the LCA.

Section 5(a) is clear that the Grievor's failure to comply with the agreement *"shall be considered just cause for the termination"* of his employment. In consideration of the Company providing him with another chance to remain as an employee - and forgoing its then presumably provable right to dismiss him for sleeping on the job - the parties all agreed that the Grievor could continue working on the understanding that a proven breach of the LCA would, in and of itself, be considered just cause for his termination. Given that clear reality, Section 5(b) cannot be interpreted to mean that the Company is compelled to prove just cause for the exercise of its primary right to dismiss the Grievor in the same manner that the imposition of regular discipline is examined under the *William Scott* test.

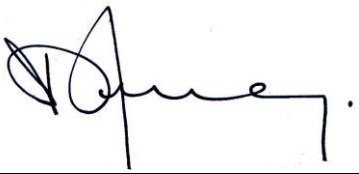
In order to avoid an anomalous interpretation, and give it meaning, Section 5(b) must be read as providing the Company with the sole discretion to either exercise its *prima facie* right of termination or otherwise impose a lesser discipline. It does not thereby establish a transcending obligation on the Company to prove that just cause existed - notwithstanding the language of Section 5(a) – so as to warrant termination pursuant to the *William Scott* test. Unless the specific terms of the LCA provide otherwise, a clause – as in this case – which provides the Company with the option/authority to choose to

impose a lesser discipline in place of dismissal does not compel the employer to prove that its primary choice of dismissal was appropriate in the same fashion as if the LCA did not exist or otherwise was merely another consideration to be taken into account.

It would subvert the intention of the parties if I were to ignore the clear language of the agreement and impose an obligation on either side which was not contained in the LCA or was otherwise operationally repugnant to it. It would also be injudicious for me to use my power to mitigate an otherwise properly imposed penalty, flowing from a breach of the LCA, notwithstanding the parties' clear agreement in Section 5(d) proscribing it. Were it otherwise, it would defeat the entire purpose of an LCA and all of the parties – union, employer and employees alike - would be the clear losers from a labour relations perspective.

The LCA clearly states that a breach of its conditions is to be considered just cause for termination. It equally clearly restricts my jurisdiction to determining if a breach of the LCA existed and, if so, specifically excludes my jurisdiction to impose a lesser penalty. The LCA ought, therefore, to be enforced according to the clear intention of the parties.

The grievance is dismissed.



May 1, 2019

RICHARD I. HORNUNG, Q.C.
ARBITRATOR