CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4695

Heard in Montreal, July 11, 2019

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor D. MacDonald of Calgary, Alberta.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. MacDonald was dismissed on September 15, 2017 for the reason as follows: "please be advised that you have been dismissed from Company Service for your violation of Canadian Pacific Policy OHS 4100 Alcohol and Drug Policy"

The Union's Position:

The Company did not respond to the Step 1 grievance. The Union submits that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. The Union also asserts that the Company breached the June 16, 2010 Substance Test Agreement in its conduct of this investigation. As a result, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. MacDonald be made whole.

The Union contends that the Company conducted a post-incident substance test in an improper manner, violating the Alcohol and Drug Procedure Policy and the June 16, 2010 Substance Test Agreement as a result.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment. In the alternative, the Union contends that Mr. MacDonald's dismissal is unjustified, unwarranted an excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union requests that Mr. MacDonald be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position:

The Company has reviewed the Union's grievance, the statement and investigation package and cannot agree with the Union's contentions. The Grievor was appropriately dismissed for a violation of Canadian Pacific Policy OHS 4100 Alcohol and Drug Policy.

The Company was investigating a derailment involving the Grievor's RCLS assignment – a serious incident. Therefore, the Grievor was properly required to submit to a drug and alcohol test.

In light of the foregoing and all material in the investigation, the Company maintains the discipline assessed was appropriate, warranted and just in all the circumstance. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.) C. Tsoi**
General Chairperson	Labour Relations Officer

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
M. MacDonald	– Counsel, Calgary
D. E. Guerin	– Senior Director Labour Relations, Calgary
M. Snider-Adler	– Physician, Toronto

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Vice General Chairperson, Calgary
T. Haug	– Local Chairperson, Calgary
W. Apsey	– General Chairperson, CTY-East, Smiths Falls
D. MacDonald	– Grievor, Calgary

PRELIMINARY AWARD OF THE ARBITRATOR

The grievor, having been investigated with respect to an incident which occurred in Alyth Yard on August 17, 2017, and in respect of which he was assessed no discipline, was called for a further investigation on August 31 in connection with “the Positive Post-Incident/Accident Substance Test that was secured at the Driver Check Clinics-Calgary, at Calgary Alberta on August 18, 2017 at 02:03 AM”. The Union has raised a question as to the propriety of a substance test being taken, but that question remains to be dealt with when this matter is heard on the merits. Following the second investigation the grievor was discharged for:

Violation of Canadian Pacific Policy OHS 4100 Alcohol & Drug Policy

This matter was grieved, and the grievance submitted to arbitration. A Joint Statement of Issue was signed on February 1, 2019. There was no reference to a Rule

G violation. The matter was listed for hearing in March, 2019, but was not heard due to the illness of the Arbitrator. It was relisted for hearing in April, but was not heard due to lack of time. Prior to that hearing date, the Union wrote to the Company on April 2nd requesting "full disclosure of all documents that the Company intends to rely upon". Following an exchange of e-mails the Company replied as follows: "for [the grievor's] case, the only document the Company will rely on that is not already in the Union's possession or in the public domain is the attached excerpt from his work history".

This matter was scheduled for hearing on July 11, 2009. On July 3 the Company wrote to the Union stating that an expert witness (a medical doctor) would attend the hearing and that she would be relying on a report, which was attached. The Union objected to the Company's calling an expert witness and to its submitting the report to the arbitration. The Union has objected on the following grounds:

> *1. The report and notice of expert are being raised far too late In the process;*
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> *2. The report purports to rely upon a change of grounds in that it alleges the grievor was in violation of Rule G when he was not terminated for such;*
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> *3. The report was never put to the Grievor or the Union in a formal employee statement (investigation); and*
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> *4. The union had previously sought full disclosure of all arguable relevant documents and particulars and the Company confirmed that such had been provided to the Union.*

At the hearing of this matter, argument was heard on the Union's objection, and the matter was adjourned. The materials before me include the report in question. I have not looked at the report except to examine its table of contents. It is a report with respect to the grievor, and includes sections relating to "Factors Contributing to Residual

Impairment" and "Residual Impairment and Safety Sensitive Work". It may be that the report contains a reference to Rule G, as the Union's submissions would suggest.

The material provisions of the collective agreement include the following:

> *Article 70 – Investigations and Discipline*
> *70.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.*
> - - -
> *(4) The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility.*
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> *- - -*
> *70.02 Clause 70.01(4) above will not prevent the Company from introducing further evidence or calling further witnesses should evidence come to the attention of the Company subsequent to the notification process above. If the evidence comes to light before commencement of the investigation every effort will be made to advise the employee and/or the accredited representative of the Union of the evidence to be presented and the reason for the delay in the presentation of the evidence. Furthermore, should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation.*
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> - - -
> *70.04 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility has been established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.*
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> - - -

The grievor was investigated with respect to a positive substance test and following that was discharged for violation of the Company's Alcohol and Drug Policy. He was not

discharged for a violation of Rule G. It may well be that the drug and alcohol policy contains prohibitions that overlap with those of Rule G. It has been very well established in labour arbitration cases over many years that in discipline cases, an employer is limited to proof of the offence or offences set out in the notice of discharge. In my view, that principle should be followed in this case, and whether or not it makes a substantial difference in the thrust of the evidence presented, it is my ruling that the Company may not advance the additional charge of violation of Rule G in making its case in support of its decision.

The grievor was discharged on August 31, 2017, within the 20-day period following the investigation, and thus within the period contemplated by Article 70.04. The investigation, clearly, had been "completed" on August 31, the date the last statement in connection with the investigation was taken. The "record", so to speak, was closed at that time. Article 70.02 of the collective agreement deals with the situation where new facts may come to light "during the course of the investigation", but not after the investigation is completed. It may perhaps be that where important facts come to light after the investigation is completed, a supplementary investigation may be held, as has been described in some arbitration awards, but it is questionable whether a supplementary investigation would be appropriate after the expiry of almost two years, as in the instant case. The collective agreement expressly requires that employees not be disciplined until an investigation is held and the evidence, which the employee and the union may of course examine and question, has been produced. That has not happened in the instant case with respect to the expert report.

It must further be noted that, when directly asked by the Union for full disclosure, the Company replied that it had provided all documents save a work history. The Union was entitled to rely on this representation.

The Company argued that expert evidence would assist the Arbitrator and noted, correctly, that I was not bound by rules of evidence and that neither the CROA Memorandum of Agreement nor the *Canada Labour Code* would prohibit my receiving the evidence in question. For the reasons set out above, however, I am persuaded that it would be unfair to the grievor and the Union to allow the introduction of such evidence at this late stage of these extended proceedings, or to overlook the representation made by the Company. Further, it is my view, for the reasons set out above, that to allow the introduction of the evidence would be to modify or disregard the provisions of the collective agreement.

Accordingly, the preliminary objection is upheld. The matter will be listed for hearing on the merits.

July 24, 2019

J. F. W. WEATHERILL
ARBITRATOR