CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4774

Heard in Calgary and with Zoom Video Conferencing, June 8, 2021

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of probationary employee Roy Savard under the terms of Article 58 of the 4.16 Collective Agreement

JOINT STATEMENT OF ISSUE:

Following a meeting held on December 30, 2019, Conductor Trainee Savard was released from his employment with CN. The Company noted in their letter "In review of your progress to date, including a review of your coaching records, your conduct and performance, the Company has determined that you are unsuitable for the role of the position at CN"

Union's Position:

It is the Union's position that the Company violated Article(s) 82, 85, 85.5 and Addendum 124 of Collective Agreement 4.16, as well as Arbitral Jurisprudence and Part III Section 239(1) of the Canada Labour *Code,* when the Company discharged Conductor Savard on December 31, 2019, absent an investigation.

The Union contends that the Company violated the substantive rights of Conductor Savard under the provisions of Article 82.1 of Collective Agreement 4.16. Conductor Savard was not provided with an opportunity to defend or respond to any concerns the Company may have had. The decision to discharge Conductor Savard was both arbitrary and discriminatory.

The Union requests that Conductor Savard be reinstated into his employment and compensated for any/all lost wages, benefits and without loss of seniority. Failing that, the Union requests that the penalty be adjusted commensurate with the event, in keeping with the Brown System of Discipline identified as Addendum 123 of Collective Agreement 4.16.

Company's Position:

The Company disagrees with the Union's position. The decision to release Mr. Savard was due to his unsuitability for the position of conductor, and in no way arbitrary or discriminatory. The Company denies the Union's allegations in this regard. The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or applicable.

FOR THE UNION:
(SGD.) J. Lennie
General Chairman

FOR THE COMPANY:
(SGD.) V. Paquet (for) **D. Taylor**
VP Eastern Region

There appeared on behalf of the Company:

V. Paquet	– Manager, Labour Relations, Toronto
S. Blackmore	– Senior Manager, Labour Relations, Edmonton
S. Roch	– Manager, Labour Relations, Montreal
D. Dickhoff	– Terminal Coordinator, Brampton

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairman, Sarnia
G. Gower	– Vice General Chairman, Bellville
E. Page	– Vice General Chairman, Toronto
R. Savard	– Grievor, Belleville

AWARD OF THE ARBITRATOR

The grievor was hired on January 28, 2019 and attended the Company training program in Winnipeg for his in-class portion of the Conductors' course. After successfully completing the classroom training, and while still on probation, the grievor worked 72 of the 90 tours of duties required under section 58.1 of the 4.16 collective agreement. The grievor was deemed unsuitable for employment on December 31, 2019, after a succession of what the Company claims were safety and attendance violations.

On August 15, 2019, the MacMillan yard experienced a fatality. A young conductor was tragically crushed by a rail car. Subsequent to this incident, in September 2019, the Company undertook a safety campaign which included individual conversations and coaching sessions with employees regarding railway safety. The safety campaign included local operations sending out weekly broadcast messages highlighting specific life critical rules (LCR's). The grievor himself viewed a total of sixteen broadcast messages dealing with the LCR's between September 2, 2019 and December 30, 2019.

On September 7, 2019, the grievor's supervisor met the grievor at which time the LCR's were discussed "and recent incidents in the territory and how we need 100% compliance with the LCR's". On October 21, 2019 the same supervisor met with the grievor and once again discussed several LCR rules. That discussion included: explaining how LCR rules were to be applied; the reason they are considered LCR's and the consequences that may follow; and, the need for 100% compliance with the LCR rules.

On December 10, 2019 the grievor was working as the yard operating employee at the Dual Hump in MacMillan yard using a Beltpack Operating Control Unit. On that occasion, the grievor was required under the General Operating Instruction (GOI) rules to obtain both permission from the Traffic Coordinator and confirmation of the signal to confirm that his movement was lined for the pullback and proper point protection. He did so and began pulling his cars towards the pullback track.

The grievor, however, did not receive a radio broadcast indicating his pullback protection was on before he started pulling his cars. Instead, the grievor initially received a radio broadcast message indicating the pullback protection was disabled. The grievor continued to pull his cars back without receiving the broadcast message that the pullback protection was on, in violation of the rules Item 6.6. The grievor was asked by his observing supervisor to bring the movement to a stop after proceeding 40 car lengths into the track. The grievor then met with the Supervisor and Job Trainer where the importance of point protection was discussed.

On December 29, 2019, the grievor was working as a Helper when he was observed leaning on equipment while it was in motion (2 m.p.h.) in violation for GOI Rule 46.2 which prohibits leaning against rolling stock. The Supervisor highlighted at the time the importance of performing his work in a safe manner.

The Company maintains in its submissions that the grievor violated numerous rules and instructions subsequent to the fatality on August 15, 2019. The Company supports this allegation by citing three instances on September 7th, October the 21st, and December 10th, 2019. In addition, the Company notes that the grievor was absent without leave on several occasions during his tenure of employment despite being reminded both verbally and electronically that he had to update the crew office on his condition/status every 24 hours. This caused the grievor to be unavailable for call to work until the status was updated.

The Union submits in argument that it was both arbitrary and discriminatory to not allow the grievor an investigation so he could defend himself against an allegation of leaning on equipment on December 29, 2019, which the Union maintains was the basis for his termination. The Union cited in support **CROA 4389** and **CROA 4344** where an investigation was held in accordance with article 82.1 in circumstances where the Company alleged culpable misconduct against a probationary employee. The Union further maintains that the grievor only received coaching on December 29, 2019 and was allowed to continue to work and finish his shift with his assigned trainee. The Union also

submits that the grievor was off on sick leave on a number of occasions due to *bona fide* illnesses which were never challenged by the Company, or were there any discussions with the grievor wherein the Company identified any shortcomings in his attendance or overall performance. The Union asserts that the grievor's non-culpable absenteeism is well within the normal range of his peers and at a rate the Company can reasonably be expected to tolerate.

With respect to the issue of the need for an investigation, the Arbitrator notes that the Union cited cases from this Office where an investigation involved the alleged misconduct of a probationary employee. Those instances, the Arbitrator notes, often involved cases where a serious incident had occurred involving a derailment (for example as in **CROA 4424**), or where the grievor reported sustaining an injury (for example as in **CROA 4389**), as opposed to cases where a new employee's performance is being observed by a supervisor.

In any event, in the absence of a provision requiring an investigation for a probationary employee, the fact that the Company did not conduct an investigation over the incident where the grievor was observed leaning on moving equipment does not amount in the Arbitrator's view to a violation of article 82.1 of the collective agreement. As stated in **CROA 821**:

> The grievor was a probationary employee, and while he was not given the investigation contemplated by article 8, that was not a violation of the collective agreement. Nor, in my view, does it appear in the circumstances to have been a violation of any of the rights the grievor might enjoy or any provision of the **Canada Labour Code**, although of course I make no determination of any issues of that sort.

The key provision in this case is article 58.1 which recognizes that where a probationary employee is determined to be unsuitable, such action will not be “construed as discipline or dismissal”. Arbitrator Hornung, in **CROA 4698**, cited the principles applicable to a probationary employee:

> In *re: U.S.W.A., Local 5046 vs. Construction Aggregates Corp.* [1958] 9 L.A.C. 187, Arbitrator Robinson sets out the applicable principles relative to probationary employees which remain in place today. In that award, the Arbitrator states, at p. 5, et. seq., the following principles which apply here:
>
> > *"c) During the probationary period the employee is, in effect, on trial to determine whether or not he possesses satisfactory qualifications and is suitable for regular employment. …*
> > *f) Unless otherwise provided in the agreement, the employment of a probationary employee may be terminated by the Company at any time during the probationary period if in the judgment of the Company the probationary employee has failed to meet the standards set by the Company and is considered to be not satisfactory. …*
> > *h) Providing the Company decision as to termination of the employment of the probationary employee is arrived at in good faith and meets the above tests then, apart from any provision in the Collective Agreement, the board of arbitration cannot substitute its own view for that of the Company."*
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> *In CROA 1568, Arbitrator Picher points out that:*
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> > *"It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status.*
> > *The Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question."*

Arbitrator Picher in **CROA 1931** also highlighted that the decision to discontinue the service of a probationary employee is essentially a subjective exercise:

> Where, as in the instant Collective Agreement, the standard of decision is based upon removal for cause predicated upon the opinion of the Company that an individual is undesirable for service, the process of decision is obviously subjective. If the Company can establish that it reached a decision based on an honest opinion, and in accordance with the general standards expressed in **CROA 1568**, even if an arbitrator should disagree with that opinion, its decision cannot be disturbed as being in violation of the terms of the Collective Agreement.

The Company coached and observed the grievor's performance over numerous months. As noted in the instances documented above, the Company came to the conclusion that the grievor's performance did not meet the standards required of a Conductor in a safety-sensitive position. Those instances included the grievor's rule breaches on December 10, 2019 involving protection of the point and on December 29, 2019 where he leaned on a moving piece of equipment. The evidence also discloses that the grievor, on several occasions, failed to update the Company every 24 hours on his condition as required. This lack of reporting, despite being reminded on several occasions to do so, in turn caused the grievor to be unavailable for work (AWOL) until his status was updated.

Overall, the Arbitrator finds that the actions of the Company were neither arbitrary nor discriminatory. In the end, the Company determined, after several months on-the-job, that the grievor was not a proper fit for its operations based on legitimate instances of performance and attendance reasons. The Company was within its rights to release the grievor from his employment given his probationary status. To interfere in the decision of the Company to release the grievor from service would amount to undermining the "substantial discretion", to quote Arbitrator Robinson, afforded an employer in deciding whether an employee should receive permanent employment status. For all these reasons the grievance is dismissed.

June 16, 2021

JOHN M. MOREAU, Q.C.
ARBITRATOR