CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5158

Heard in Edmonton, March 13, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 demerits and dismissal of Conductor Travis Tone of Medicine Hat, AB.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Tone was assessed 30 demerits and dismissed on December 14, 2023, which was described as:

"At the conclusion of your investigation, your culpability was established for booking unfit on Monday, November 20, 2023 prior to your scheduled CO1-20 shift then you booked back on after your shift which commenced at 13:54 into your scheduled days off Tuesday/Wednesday, extending into your personal time off. You booked off to attend a company investigation on November 23, 2023 to protect your shift on November 24, 2023 and then booked off unfit. It was determined while working in Medicine Hat Terminal, you were in violation of the following:

- T&E Availability Standard Canada

Please be advised that you your discipline record has been assessed 30 (THIRTY) Demerits. Notwithstanding this violation in and of itself warrants discipline, based on your disciplinary record, this incident constitutes a culminating incident, warranting dismissal. You are hereby DISMISSED from Company service for an accumulation of 90 Demerits."

UNION POSITION

The Union contends the Company's failure to respond to the Step One appeal is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. For these reasons, the Union contends that the discipline is *void ab initio* and ought to be removed in its entirety and Mr. Tone be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above. Additionally, it is the Union's position that the Company has failed in providing the absence in question was not bona fide.

The Union contends the Company has failed to consider mitigating factors contained within the record.

The Union contends the discipline assessed is discriminatory, arbitrary, unwarranted, unjustified, and excessive in all the circumstances. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline. The Union disputes any reference to the Company's Discipline Policy, and the manner which it has been applied in the instant matter.

The Union contends that the assessment of discipline for booking unfit is a violation of CPKCR Fatigue Management Policy 4.7, 10.1, 10.2 and as echoed in the Duty and Rest Period Rules (DRPR); DRPR 5.1, 5.2, 5.3 & 5.6; HS 4552 & 5830, and Article 35 of the Collective Agreement.

The Company alleges a violation of the T&E Availability Standard, which has not been substantiated.

The Company has failed in its duty to accommodate Mr. Tone and has otherwise not been reasonable in the handling of this employee, nor demonstrated any undue hardship by not properly accommodating him. The actions of the Company, therefore, are in violation of the Canadian Human Rights Act, Canada Labour Code, recent jurisprudence and the legal obligation to accommodate an employee. The Company has not provided its position regarding the duty to accommodate Mr. Tone prior to the Joint Statement of Issue.

The Union seeks an order that the Company has violated the above-cited Collective Agreement articles, policies and legislation. The Union requests that the discipline be removed in its entirety, and that Mr. Tone be reinstated without loss of seniority and benefits and be made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Union suggests the Company has effectively failed to respond to the local grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the local grievance response, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure.

The Union has alleged the statement was not fair or impartial. The Company has carefully reviewed the objection raised during the statement as well as details of the Union's objection in its grievance. A plain read of the statement confirms the Grievor's culpability was established and that the questions objected to were not leading, unfair, partial nor asked the Grievor to assume culpability.

The Company maintains the grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. The Company maintains there is no evidence of discrimination and that the Grievor was not discriminated against.

Discipline was determined following a review of all pertinent factors, including those described by the Union.

Regarding the Union's allegation that the discipline was discriminatory, unjustified, unwarranted, arbitrary and excessive, the Company cannot agree with these allegations and maintains that the discipline assessed was not discriminatory, unjustified, unwarranted, arbitrary or excessive.

The Company assessed discipline to the Grievor for violations that occurred prior to the employee submitting medical information restricting him from safety critical duties. This discipline resulted in the Grievor's dismissal. The Company maintains no violation of the duty to

accommodate occurred as the Grievor never sought medical consultation prior to the incidents, in order to substantiate any alleged medical disability.

The Company has not failed to accommodate the Grievor as alleged. As such, the Company maintains no violation of the Canadian Human Rights Act, Canada Labour Code, recent jurisprudence and the legal obligation to accommodate an employee.

Regarding the Union's allegation that the assessment of discipline for booking unfit is a violation of CPKC's Fatigue Management Policy 4.7, 10.1, 10.2, Duty and Rest Period Rules (DRPR); DRPR 5.1, 5.2, 5.3 & 5.6; HS 4552 & 5830, and Article 35 of the Collective Agreement, the Company does not agree and maintains no violation of CPKC's Fatigue Management Policy 4.7, 10.1, 10.2, Duty and Rest Period Rules (DRPR); DRPR 5.1, 5.2, 5.3 & 5.6; HS 4552 & 5830 or Article 35 of the Collective Agreement has occurred.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and not compensation or benefit is appropriate in the circumstances.

For the Union:	**For the Company:**
(SGD.) D. Fulton	**(SGD.) A. Cake**
General Chairperson	Assistant Director Labour Relations

There appeared on behalf of the Company:

F. Billings	– Director Labour Relations, Calgary
R. Araya	– Labour Relations Officer, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
J. Hnatiuk	– Vice General Chairperson, Coquitlam, British Columbia
T. Stehr	– Local Chairperson, Medicine Hat, Alberta via Zoom
T. Tone	– Grievor, Medicine Hat, Alberta via Zoom

AWARD OF THE ARBITRATOR

[1] The Grievor is a conductor, based in Medicine Hat. He began his service with the Company in April of 2018.

[2] The Grievor was assessed 30 demerits for two incidents of what the Company maintained was "*patterned absenteeism*" which is booking "unfit" or "ill" on days adjacent to days off or other forms of paid leave. It was alleged that given there was a "pattern", the absences were culpable and deserving of discipline.

[3] The Company's assessment of 30 demerits in this dispute triggered the activation of 30 deferred demerits and resulted in the Grievor's dismissal for accumulation, given he was (then) at 90 demerits.

[4] The Union filed this Grievance against this assessment of 30 demerits. It pointed out that if no culpability is found, 60 demerits are impacted, given the deferred discipline.

[5] This is the second Grievance involving this Grievor, which was heard at the March 2025 CROA Session. In **CROA 5157** an assessment of 20 demerits was vacated, due to a deficiency in the Company's position in the JSI. After the reduction from **CROA 5157**, the Grievor stood at 70 demerits. As dismissal occurs at 60 demerits or more, the Grievor remained dismissed.

[6] The Union brought forward several preliminary allegations, including that the Investigation was not fair and impartial and that the Company breached the Collective Agreement by failing to respond to the Grievance. It also alleged the Company acted in bad faith.

[7] Regarding the merits, the Union pointed out the Company was well aware the Grievor had suffered from a significant disability which had rendered him unfit for several months, earlier in 2023. It argued the Company either failed to establish culpability for the two absences of November 20, 2023 and November 24, 2023, or, alternatively, it failed to accommodate the Grievor's disability once he disclosed his concerns with a relapse of his medical condition on November 23, 2023. The Union argued that November 20, 2023 should not have been disciplined in any event, as that absence had been investigated without discipline, through a previous process. It argued the absence of November 24,

2023 was assessed *after* the Grievor had already raised the issue of a disability the day before, and that unfitness was later medically validated.

[8] Even if the absences were appropriately addressed, the Union argued in the alternative that the absences were not culpable, as the Grievor had suffered from a relapse in a medical condition for which he had previously been off work, and of which the Company was aware, which impacted his fitness to work. It argued the Grievor disclosed that issue on November 23, 2023 and sought accommodation prior to the discipline being assessed in December of 2023. The Union argued the Company had accepted the diagnosis of the Grievor's doctor in December of 2023 and the Company had planned to arrange for an independent medical opinion. It argued that before that could be completed, the Company chose to address the absences as "culpable" and dismissed the Grievor. It argued this discriminated against the Grievor on the basis of disability as the Company improperly dismissed the Grievor, instead of assessing his issues through an accommodation lens. In particular, it argued the Company assessed discipline prior to assessing whether the Grievor's medical information explained the two absences. The Union also argued a lack of good faith on the part of the Company.

[9] The Company argued it disciplined the Grievor based on the information which it was aware of at the time the discipline was assessed. It noted the Grievor had returned to work in September of 2023 "without restrictions". It argued it was entitled to assume proper attendance at work could be maintained. It further argued the Union had failed to meet its burden of establishing there was a *prima facie* disability to be accommodated, or that the Grievor's absences were in fact even connected to that disability. It also pointed out the Grievor did not follow the proper procedure for "booking unfit". It argued that a

culpable “pattern” of absenteeism was established and its discipline choice was not excessive, but was just and reasonable, given that pattern and all mitigating and aggravating facts, including the Grievor’s record. It also argued the Grievor failed to raise his medical issues when specifically questioned as to whether any medical explanation existed for his absences (in mid-November), when the November 20, 2023 absence was first Investigated. It argued it was entitled to – and did – assess this discipline through the lens of “patterned” absenteeism when another absence occurred on November 24, 2023, which supported that pattern.

[10] For the reasons which follow, I am persuaded that the Company has failed to meet its burden to establish the Grievors two absences on November 20, 2023 and November 24, 2023 were culpable. Without culpability, there is no basis for discipline. Neither should his previous deferred demerits have been activated.

[11] The Grievance is upheld. The discipline is vacated.

[12] Given the Grievor’s medical issues, the terms under which the Grievor is to be reinstated and issues of remedy, are outlined at the end of this Award.

Analysis and Decision

Preliminary Objections & Principles

[13] The Union has resisted culpability and alternatively alleged failure to accommodate.

[14] The question of whether the Grievor has appropriately raised his need for accommodation is distinct from whether the Company has established culpability for patterned absenteeism. As will be demonstrated in this Analysis, it is not the case that

where the one ends, the other begins. Different analyses are attracted, and different burdens imposed.

[15] This dispute involves points at which the two analyses diverge, and points where they overlap. It addresses what information the Company must properly consider in determining culpability, and its procedural obligations to ask further questions when it is provided medical information that could explain those absences.

[16] Four preliminary points can be briefly addressed.

[17] First, given the finding in this case, it is unnecessary to address the Union's preliminary objections regarding the Investigation; the Company's failure to respond to this Grievance; or whether the Company acted in "bad faith". Second, given the finding, it is also unnecessary to address the issues surrounding whether the Grievor appropriately "booked unfit" or whether the Grievor did – or did not – follow the appropriate procedure. Third, the Company did not take the position in this case that the Grievor was dismissed for non-culpable "*innocent absenteeism*". That is a different – and non-culpable route for dismissal under arbitral jurisprudence from discipline for "*pattern absenteeism*". Fourth – and following from the third point - the Company in this case chose to follow a *disciplinary* route with this Grievor.

[18] Under the familiar *Re Wm. Scott* framework, the first question that must be addressed under a disciplinary framework is whether the Company has established culpability for "*patterned absenteeism*".

[19] In this industry, while employees are entitled to determine whether they are "fit" to work under Article 35, it is not an "*unfettered*" right. Employers – and Arbitrators – are

watchful of situations where that ability is abused. It is clear in the jurisprudence that there is no "*carte blanche*" ability of an employee to "book unfit": **CROA 4715-D**.

[20] As noted in the jurisprudence – and echoed in the T&E Availability Standard – where an employee books "unfit" in days adjacent to other time off - such as into or out of vacation; surrounding scheduled days off; or other paid leave days – then the employer can treat those instances as culpable misconduct, as demonstrating "*patterned absenteeism*", which is an abuse of the "book unfit" provision and so is culpable misconduct, capable of attracting discipline.

[21] The allegation in this case is that this is what the Grievor has done: he *improperly* added two absences to other days off – whether scheduled or paid leave - to extend his time away from work when was not otherwise "unfit".

[22] It must be emphasized that the burden to establish culpability rests ***with the Company***. To establish culpability, the employer has an obligation to investigate the circumstances surrounding the absences. In fact, that is part of what the Investigation does in this industry – it asks the Grievor to explain his behaviour. When absences are at issue, the Investigation seeks to determine *why* those absences have occurred.

[23] The assessment must be rigorous as the question is whether the Grievor *purposely* booked off to gain extra time off, rather than booking off time due to being "*unfit*".

[24] When the employer investigates an employee and determines culpability, it must do so by considering "all" of the facts and circumstances surrounding that absence, which it may receive ***before*** it makes that discipline decision. There is no "bright line" that

suggests that only information known *at the time the misconduct occurred* is relevant to an assessment of culpability.

[25] Therefore, if the employer receives medical information from an employee that a relapse has occurred for a previous condition accommodated by that employer; and that information is received ***before*** the Company disciplines the employee, then that information must be considered in assessing culpability for discipline.

[26] Should an employer have *questions* resulting from that medical information as to whether it explains the absences, it has an obligation to ask those questions *and seek that further information,* before it makes its decision regarding culpability, *as that information is relevant to the burden of proof it carries to establish culpability*.

[27] It will be a matter of fact for each case whether that medical information is sufficient to cast doubt on the issue of culpability, assuming a pattern of culpability is first established.

[28] In a case where there is a medical diagnosis in that information which indicates a relapse of the same condition *already accommodated by the employer* that has also previously rendered that employee "*unfit*", that reasonably places the culpability of that absence into question. It is difficult to understand how that information would not do so, given that the same condition had exists that had *previously* rendered that employee "*unfit*" to work for several months.

[29] Put another way, if an employee provides a reasonable explanation for why he was "unfit" for work by raising the relapse of a medical condition where he was *previously* unfit

and accommodated by that same employer, it is then in the employer's court to address whether that explanation still leads to culpability for the absences at issue – or not.

[30] When an employee provides to an employee medical information and a diagnosis, that information may also trigger the employer's duty to accommodate that employee. Under that process, the Company also has a "duty to inquire", it it has questions regarding an employee's medical information. Part of its procedural obligation is to seek those answers.

[31] It is not entitled to *assume* what those answers would be, whether from a culpability perspective, or from an accommodation perspective.

[32] Seeking those answers when medical information is provided *prior to* discipline is not the same as considering "post-termination" evidence, as discussed in *Campagnie Minière Quebec Cartier v USW, Local 6869* 1995 CanLII 113 (SCC), as the employer *has* medical information *prior to* making its decision. In that case, the employer did not have that evidence *prior to* the discipline decision.

Facts & Analysis

[33] Turning to the facts, a careful review of the Company's OH&S files (Disability Management) has been undertaken as part of these deliberations.

[34] It is not disputed the Grievor initially went off work due to a respiratory infection in January of 2023.

[35] In February of 2023, an entry was made in the Company's records regarding a conversation with the Grievor. At that point, the Grievor had been off due to "long COVID" symptoms, but disclosed to the Company that he also had a second condition for which

he required accommodation (which was the "Disability" at issue in this dispute). It was noted in the Company records that *"EE did not wish to provide much detail but did share they have started [treatment] already*." It was also noted the Grievor's tone was "*low*".

[36] Reviewing the OH&S file going forward from that date, the Grievor provided regular medical information to the Company to substantiate the Disability, and it was accepted by the Company that he had been subject to both "long Covid" and the Disability, which rendered him either "*unfit*" or restricted to "*modified duties*".

[37] I am satisfied that the Company had managed the Grievor's Disability earlier in 2023, including gathering and reviewing medical information. The Company was aware of the diagnosis and the impact of the Disability on the Grievor's ability to work.

[38] The Grievor was initially "*unfit"* for all duties. He began treatment and by mid-March of 2023, he was fit for "*modified duties*".

[39] By April of 2023, he was stated to be "*in remission*". However, he was required to have a period of remission prior to his return. It is not clear in the evidence whether that period was one month or three months, as both periods are referenced. What is relevant is a period of time was required to be served. I am satisfied the Company considered he would be allowed to return to work in July of 2023.

[40] What is also relevant is that by the time that period of remission had concluded, the Grievor had developed symptoms of long COVID and had been referred to a specialist.

[41] His return to work – which could have occurred in July of 2023 when his remission had been established - was therefore delayed until September of 2023.

[42] The Grievor returned to work September 8, 2023. His medical FAF form was completed by his physician on September 5, 2023, a few days before his return. While the Grievor's physician indicated that the Grievor was "*able to safety perform their Safety Critical Position or Safety Sensitive Position duties"* [that box was filled in] and the physician had filled in the box that the Grievor had "*Normal Functional Abilities – Fit for Regular Hours and Duties*, **his physician *<u>also</u>* wrote in *"…return to full duties we advise to have consistent day/night shifts with nothing 6 am to establish a healthy sleeping pattern*".**

[43] Looking at the corresponding dates in the Company's records, on September 7, 2023, Company personnel noted the medical report was "reviewed" and that the employee was "cleared to return to work effective immediately". Under "Fitness to Work Status Made by Health Services", the records stated "*fit SCP no restrictions*".

[44] A statement such as the bolded statement, above, does not indicate the Grievor was able to return to work "*with no restrictions*" but rather raises issues of accommodation of shift schedule. There is no indication the Company was aware of the bolded phrase above, nor was any clarification sought from the Grievor's physician for what "*consistent day/night shifts with nothing 6 a.m."* meant. Did that notation mean, for example, that the Grievor was to have only "day shifts"? While the Grievor *did* have consistent shifts when he returned – as his position was one with established start and end times and consistent days off - he was not on a day shift. His initial shift was an overnight shift, <u>beginning at 6 p.m.</u>

[45] There is no notation the Company considered whether the Grievor's shift complied with this recommendation.

[46] The records demonstrate the Company was aware the Grievor was required to take a *further* week off work due to "fatigue" in late September of 2023 – the same month as he returned to work.

[47] No reference appears to have been made to the earlier September 5, 2023 report regarding aiding the Grievor to establish healthy sleep patterns with his "*day/night shifts*" or clarification of the "*6 a.m*." comment, although a Medical Report was completed on September 19, 2023 which did not contain the same reference to "day/night" shifts or any reference to "6 a.m.".

[48] The Grievor was hesitant to provide to the Company information he had relapsed later in the Fall of 2023, until he was encouraged to do so by Mr. Smith, his Union representative. That hesitancy is also evident in the OH&S file from the Grievor's previous illness.

[49] During his Investigation on November 28, 2023, the Grievor did make that disclosure. In that Investigation, the Grievor brought to the Company's attention that he believed he had suffered a relapse of his *previous* Disability which had kept him off work in early 2023. He offered the explanation that he felt he had returned to work "*too early*" and he indicated his understanding that he was "*immediately put back on the board without question"* and that he understood he would have a "*1-3-month period*" which he did not receive (Q/A 53).

[50] It is not clear if he is referring to this scheduling for his sleeping patterns, or to the period of "remission" which occurred *before* he returned to work. The Grievor appears to be confused with the remission which had to be established *before* he returned to work.

There is no other requirement in the medical documentation for a “one to three month” adjustment period.

[51] It was the Grievor’s evidence that his previous medical condition was “compounding” and that his symptoms first started in January of 2023 (Q/A 46). He also indicated he had contacted his Disability Manager, on November 24, 2023 regarding how his disability was “*affecting my availability at work*” (Q/A 52). He also stated in that Q/A 53: “*I thought I was fine, when I was brought back early. It seems at that point that wasn’t. During much consideration I thought it was best to advise OHS Disability Management Specialist Annie Scott*”.

[52] The Grievor was not in fact brought back “*early*” as he had satisfied the period of remission, which began in April of 2023. He was not brought back to work until September of 2023, five months later.

[53] However, what I am satisfied *did* occur is that Disability Management did not properly assess his physician’s shift restrictions at that point in time. While that entry was not as clear as it might have been on the physician’s part, the Company appears to have “glossed over” it completely when it reviewed this record. It was there to be seen and should have been clarified. It must also be noted, however, that the same restriction was not written on the Medical Report of September 19, 2023.

[54] While I accept the Company’s argument that the Grievor was not capable of establishing a medical diagnosis with his explanation *at the Investigation*, I am not convinced that is the standard when the issue is culpability for an absence. It is the *Company’s* burden to establish the Grievor’s absences were *culpable* and supported

discipline, when considering all of the facts and circumstances, including that it was not credible that he was "unfit" when he booked off.

[55] When a medical explanation is raised, that explanation must be considered in making that assessment, as it impacts the credibility of the Grievor's explanation.

[56] That requirement is different than establishing a disability for the purposes of triggering the duty to accommodate. Caution must be exercised in not confusing the Company's burden to establish culpability with the Union's burden to establish *prima facie* discrimination by establishing a disability exists (which this Grievor did on November 29, 2023).

[57] The initial question raised by this dispute is what obligation *the Company* had to explore the Grievor's explanation in assessing his *culpability* for these two absences? The Company's obligations to assess its accommodation responsibilities is a different process than assessing credibility of the Grievor's explanation for the purposes of culpability.

[58] In assessing culpability, the Company must assess the reasonableness of the Grievor's explanation for his absences. In this case, the discipline decision was not made until mid-December 2023. Prior to that decision being made, the Grievor provided an explanation in his Investigation that he felt he had relapsed from a previous medical condition accommodated by the Company, which condition impacted his availability for work.

[59] It must be recalled the Grievor *had* suffered this same condition which had rendered him "*unfit*" several months earlier, which had been managed by the Company.

The diagnosis made in that medical information is the same as what was previously accommodated. I am satisfied the November Report had established a relapse had occurred, as stated by the Grievor in his explanation. In his words "*I thought I was fine, but I wasn't*". I am satisfied that the November Report contained a diagnosis of the same condition suffered by the Grievor earlier in 2023, and a direction not to schedule the Grievor's shifts between midnight and 6 a.m.

[60] I am further satisfied that Report supported the Grievor's explanation that he had a relapse of his symptoms, which explained why he booked unfit.

[61] I am also satisfied the Grievor had offered a credible explanation for why he had not had his doctor complete a Functional Abilities Form to substantiate his illness, prior to November 28, 2023 when he raised that issue in his Investigation. The Investigation was paused and he was given the paperwork. He had it completed by his doctor the next day, November 29, 2023 (the "November Report").

[62] It is not always the case that medical information is provided when employee books unfit. However, in this case, it was. At a minimum, that medical evidence should have caused the Company to ask further questions to assess whether its assumption of culpability could be supported.

[63] It is not disputed the Company received the November Report ***before*** it made the choice to discipline the Grievor in mid December 2023. That timing is important in this case. This is not a case where the Company had already terminated the Grievor and *then* medical information was provided, as in *Campagnie Minière Quebec Cartier v USW, Local 6869.* I am satisfied that in this case, the Grievor raised an issue that he had relapsed from his previous medical condition at his Investigation, and he established

prima facie discrimination when he provided the Company medical information on November 29, 2023 from his physician that indicated he had relapsed from his previous condition. The duty to accommodate was then triggered.

[64] The fact this medical information was not provided until November 29, 2023 did not relieve the Company of its burden to establish the Grievor's culpability for the absences which were close in time to that diagnosis, given that the medical condition was the ***same*** condition that the Company was aware had been previously accommodated that same year and which the Company accepted had rendered the Grievor "*unfit*".

[65] The Union in fact argued the Company had accepted the Grievor's doctor's information in late November 29, 2023 that he was "unfit" and required an accommodation for not having shifts between 12 a.m. and 6 a.m. It argued this explained why the Grievor did not attend work on November 24, 2023, being the day after he disclosed his medical issues to the Company and his concerns with his fitness to work, which were validated by his doctor in the report of November 29. The Company resisted that it had in fact determined the Grievor was "unfit" and argued there was no evidence in its files that this determination had been made. It argued it was not aware the Grievor's absences were explained by any disability and in fact no connection between those absences and the disability was made by the Grievor's physician.

[66] I have reviewed the OH&S file carefully on this disputed issue.

[67] On December 6, 2023, there is a notation in the Company's file regarding its assessment of that Report. Given its importance, the December 6, 2023 entry from the Company's file is reproduced, below:

> Call to Employee: aware their [report] is reviewed and their physician has confirmed that they are fit for modified duties without indicating if EE will be working full hours or graduated hours. EE explained that their physician has confirmed that they can work modified duties full hours. EE is unsure of next appointment date with their physician. EE is aware that writer will send an e-mail with attached letter to f/u with their physician to provide more information regarding their [condition]. Writer noticed that EE's tone was very low. EE is aware that HS [Health Services] will be restricting them from SCP duties [safety critical]. From previous case notes, EE had been experiencing on and off [health condition].
>
> …
>
> …HS is unsure if EE's [health condition] is in remission.
>
> **Fitness to Work Status *made by Health Services*: restricted from SCP DUTIES.**
>
> Reassessment Date: not provided Duration of Restrictions: unknown Estimated date of return to full unrestricted duties: unknown (EE will need to be in remission for a continuous period of 3 months)
>
> **Plan: request IMH report, due January 8, 2024**
>
> [*emphasis added; at pp. 60-61 of Union Tab 11*]

[68] Further, the Company issued a "*Fitness to Work Assessment Form (FTWA*)" on December 6, 2023 at 9:55 a.m. and emailed that to various individuals. That Form states that "*This assessment provides the current Fitness to Work Status of this employee under the Fitness to Work Medical Policy and Procedure*". It then states that the Grievor's "*fitness to work assessment is*": "*Restricted from Safety Critical duties, effective December 6, 2023"* and that *"[f]urther medical information*" is "*to be completed*" by January 8, 2024.

[69] It is confounding how – in the face of this evidence - the Company can maintain an argument that it did not assess the Grievor's Disability as established, before it disciplined him later that month. That position is simply not borne out in the evidence. As noted from the emphasis placed into the above December 6, 2023 Company entry, I am satisfied that the Company had not only ***accepted*** the Grievor's doctor's diagnosis by

December 6, 2023, but "Health Services" had *independently determined* that the Grievor was "*restricted from SCP DUTIES*". I am satisfied the Company had accepted - *by early December of 2023, **before** discipline was assessed* the Grievor was fit only for modified duties. I am further satisfied the Disability noted in the November Report was the same as he earlier suffered, which had previously rendered him "unfit".

[70] The reasonable "*plan*" of the Company – when faced with this information – was to obtain a future report regarding the Grievor's condition and the specifics of his limitations, in January of 2024. By that point in time, the Company already knew the Grievor's physician recommended no shifts between midnight and 6 a.m., which is a fact the Company should have clarified with the Grievor's physician back in early September of 2023, but did not.

[71] The independent medical planned by the Company may – or may not – have established the Grievor's explanation was credible for his absences in late November, 2023.

[72] Unfortunately, given the Company's disciplinary choice, that required follow up did not occur.

[73] I am convinced this is a case where the "left hand" of the Company did not know what its "right hand" was doing. While that may be the case, the Company is judged by the information which it had regarding the Grievor's Disability, when it chose a disciplinary course in the face of a Disability.

[74] To summarize, the Company knew before it chose to discipline the Grievor that a) that the Grievor's doctor had raised an issue of accommodation for shift schedule back

in September of 2023 that was not addressed; b) that the Grievor had already needed time off shortly after starting work, for “fatigue”; c) that the Grievor felt he was experiencing the same symptoms as previously when he was determined “unfit” and felt he had come back “*too early*” given his own evidence and explanation, raising the issue of a “relapse”; and d) that the Grievor suffered from the same Disability as previously and was “unfit” to perform his safety critical duties (based on the November Report). All of that information was known – or should have been known - by the Company ***before*** it chose a disciplinary path for these two dates. The Company should also have followed up with the Grievor’s physician back in September 2023 regarding the direction given regarding scheduling in that documentation.

[75] Given the Grievor’s previous medical history known to the Company – and his own stated explanation of *relapse* of the same symptoms previously suffered, the Company was not entitled to “*assume*” there was no connection between the Grievor’s absences and his Disability and proceed along a disciplinary path, as if that understanding was true. Neither was the Grievor required to make that connection, given the specifics of the history in this case and the fact it was the *same* condition for both instances of Disability.

[76] It is the Company’s burden to establish the Grievor’s explanation was not credible and he was culpable for pattern absenteeism. If it had questions arising from the Grievor’s medical information, it had a duty to inquire as to the specifics of the issues presented. It could not maintain there was credibly “no” connection, when the *same* Disaibity in the past had rendered the Grievor “unfit”, given the proximity of the November dates to that diagnosis. Further, the Grievor had also given evidence he had been experiencing the

same symptoms when he booked “unfit” in late November 2023 as he had previously and he might have come back to work “*too early*”.

[77] The issue of *when* the Disability began to act was live between the parties. The Company should have proceeded with its plan to seek an independent medical examination and determine the Grievor’s limitations, to establish whether he was culpable or not.

[78] The Company pointed out the Grievor did not rely on a medical condition in its initial Investigation of the November 20, 2023 absence. However, the Company did not only rely on that previous Investigation in disciplining the Grievor. Leaving aside the question of whether it was entitled to conduct two investigations of the same occurrence, the Company chose to Investigate the Grievor twice regarding that absence, alleging it was part of a pattern. While the Union took exception to that, it is unnecessary to resolve that issue. As the Company itself chose to couple the November 20, 2023 with the November 24, 2023 absence as part of a “pattern”, the Company was not at liberty to ignore any possibility he had relapsed which impacted his attendance on <u>both</u> November 20, 2023 and November 24, 2023, when he disclosed in the second Investigation that he had relapsed.

[79] This is especially the case when it ultimately received medical information to substantiate that concern, *before* the disciplinary decision was taken.

[80] Turning to the jurisprudence, the parties filed multiple authorities. Given the expedited nature of this process, not all of these authorities will be addressed. Several authorities filed by the Company will be noted, given this Award agrees with the Union’s position.

[81] This is not a similar case to *Minière Quebec Cartier v USW, Local 6869,* relied upon by the Company. In that case, the grievor did not have a diagnosis of alcoholism *prior to* his termination, with a corresponding level of medical material provided to the employer, as an explanation for his issues.

[82] In this case there *is* a previous diagnosis of Disability and a relapse is at issue. That case is therefore distinguishable.

[83] Neither is this case similar to *CP v. Teamsters Canada Rail Conference (LaChance Grievance).* In that case, the Arbitrator relied on a decision in *Canada Post Corp. v. CUPW (Martin)* 1992 CarwellNat 2127, where the Arbitrator specifically noted the *"…apparent lack of any evidence to disclose a chronic or recurring illness that would justify such a pattern*". In this case, that *is* that type of evidence which exists. **CROA 2656** is also distinguishable, as that involves discipline for "*innocent absenteeism*", which is not the issue in this case. Like in the *Canada Post* decision, that case also noted the lack of any *"single medical condition or disability*" which "*contributed*" to the pattern of behaviour. **CROA 5106**, a decision of this Arbitrator, did not involve any medical evidence for missing a call.

[84] That is not these facts. In these facts, there *is* a "medical condition" at issue.

[85] In *Re Coast Mountain Bus Co. and CAW, Local 111,* the Arbitrator considered the expert evidence provided and determined the grievor was *not* suffering from alcoholism when he showed up to work and drove four hours around Vancouver while impaired. That is also distinguishable from the facts in this case.

[86] To summarize, the Company bears the burden to establish the Grievor's culpability. I am not convinced the Company has met that burden. Given the facts in this case – including the Grievor's previous Disability; its impact on his fitness; the evidence he had "relapsed"; and the Company's failure to appropriately follow up the Grievor's initial restrictions of September 5, 2023, I agree with the Union that the Company's "rush to discipline" this Grievor was premature.

[87] The "plan" for follow up medical information was never carried out, as it should have been before culpability was presumed.

[88] Given the Grievor's evidence of the type of symptoms he was experiencing – and his medical information offered in support of a relapse, I am satisfied that the Company has not established culpability for "pattern absenteeism in this case.

[89] The Grievor must be cautioned, however, that this Arbitrator was disturbed by the fact that his medical condition seemed to only require extra "rest" when that rest already aligned with other paid days off – whether they be scheduled days off, vacation or *Canada Labour Code* leave. While that concern was overtaken in this case by the Company's actions in inappropriately moving to discipline prematurely, the Grievor is cautioned that it is unusual for disabilities to manifest in such a predictable pattern.

[90] A repeat of that pattern in future by this Grievor upon his return to work would reasonably cause the Company – and an Arbitrator – considerable concern.

[91] The Grievor is also cautioned that if he chooses not to be open with the Company regarding his health issues, he risks a finding of culpability.

[92] That leaves the question of the appropriate remedy.

[93] With the demerits vacated, the Grievor's previous 30 deferred demerits would not have been triggered and he would not have been dismissed for accumulation, as was the case in **CROA 3921.** Given that reality, the Grievor must be reinstated.

[94] Given that the Grievor's health status is uncertain, the following conditions are appropriately applied for the Grievor's reinstatement, which bear some similarity to those imposed in **CROA 4715-D**:

a. The Grievor is to submit to any medical assessment required by Health Services to return to his position as a Conductor, which assessments are to be completed as soon as possible;
b. Should the Grievor not be determined fit to return to Safety Sensitive work due to his Disability, but capable of returning to accommodated work (such as a different shift schedule to aid in his sleep patterns), the parties are to engage in an accommodation process to determine if the Grievor can be accommodated to the point of undue hardship given his current health realities.
c. Should the Grievor be determined to be fit to return to work in some capacity and should his attendance metric fall below the average for his Terminal over a three-month period, or should there be concerns with a "pattern" of absences, the Grievor will be given the opportunity to establish on medical evidence acceptable to the Company that he has suffered a relapse of his previous condition, before disciplinary action is taken.

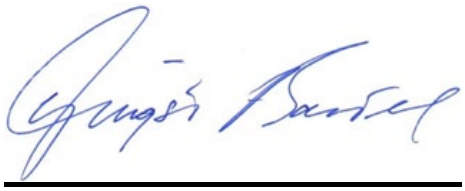
[95] The Grievor's reinstatement is to be with no loss of seniority or benefits, and with appropriate compensation. However, in this case, the *amount* of that compensation is complicated by the fact there is no evidence for the Grievor's current state of health, or how long it took him to recover from his relapse in late 2023, before he could have returned to work. It is also not clear whether the Grievor had any restrictions upon recovery, or if the Company would have been able to accommodate those restrictions, or whether the point of undue hardship would have been reached. Neither is it clear what

income the Grievor has been able to earn in the time period since his dismissal, which would require deduction from such an Award.

[96] That is all evidence that would be required to address the question of compensation.

[97] Therefore, the matter of the compensation owed to the Grievor is remitted to the parties for their further discussion and agreement. I retain jurisdiction should they be unable to agree on the appropriate amount. Should that matter require the assistance of this Office, it is directed to be scheduled for a CROA Session over which I preside, on an expedited basis.

I retain jurisdiction regarding any questions relating to the implementation of this Award; for any issues relating to the directions and issues of remedy; to correct any errors and to address any omissions to give this Award its intended force and effect.



May 2, 2025

CHERYL YINGST BARTEL
ARBITRATOR