CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4529

Heard in Montreal, January 11, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on May 3rd, 2016 Conductor AB was dismissed for delays in operations during the shift of March 31, 2016. (Unofficial translation.)

The Union's position is that the dismissal is unjust, unreasonable, and excessive. The first investigation deduced that Mr. AB booked unfit during his shift account constant stressors placed on him by local management. Also, as disclosed by Mr. AB, personal issues were present but they did not preclude him from finishing his shift. He was able to work however it was the constant questioning by local officials during his shift that caused him to book unfit. The supplemental investigation called two weeks later was not necessary as no new evidence was brought forth to warrant it. This is a violation of the investigative process outlined in the CBA. Mr. AB simply removed himself from a situation where he felt that the safety of himself and coworkers would be better served. He was not insubordinate nor did he intentionally delay operations. It is unfortunate that the Company had put productivity ahead of the health and safety of its employees. The Union contends that the Company has violated the CBA in regards to fair and impartial investigations, the unfit clause of the 2012 Kaplan Award, section 239 of the Canada Labour Code, as well as the Canadian Human Rights Act because of Mr. AB's inability to work when sick. Mr. AB sought medical treatment and has Doctor provided reports supporting his reasons to be off at the time. The Company chose to continue with his termination regardless of this substantial probative evidence. The Company, in its grievance response, remarked that the Company is a transportation service provider. *Our customers expect the Company to deliver their freight safely, in the shortest amount of time possible*. This response does not condone the dismissal as punishment. It should support the fact that Mr. AB was justified as he was unable to finish his shift because he was sick and safety could be compromised. As such, to dismiss him is unfair as what happened was through no fault of his.

The Union requests that Conductor AB be reinstated with all discipline removed from this event, payment with interest for all loss of wages, without loss of benefits or seniority. The Union further seeks punitive damages for the outright violations of Mr. AB's rights under the Collective Agreement, the *Canada Labour Code*, and Human Rights. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

B. Scudds	– Manager, Labour Relations, Minneapolis
C. Clark	– Assistant Director Labour Relations, Calgary

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
M. Biggar	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smith Falls
A. B.	– Grievor, Montreal
D. Psichogios	– Vice General Chairman, Montreal
S. Brownlee	– General Chair, Stony Plain
G. Lapointe	– Local Chair, Montreal

AWARD OF THE ARBITRATOR

This arbitration concerns the dismissal of Conductor AB for delays in operations during his shift of March 31, 2016.

The Grievor was hired by CP on November 15, 2010 and had been with the Company for four years and a half at the time of dismissal. Before his employment with CP, the Grievor was an aerospace technician working at Bombardier for nine years before being laid off because of downsizing. During his time with the Company, Mr. AB had accumulated 80 demerits and was dismissed once in 2014 for accumulation of demerits, but was later reinstated in November 2014.

The Grievor's medical records show that he has been intermittently suffering from depression and anxiety since 2006. All the information and diagnoses were extracted from the Grievor's OHS file, which the Employer was aware of.

On March 31st, 2016, the Grievor was working as a Yard Helper on a yard assignment. At approximately 18:30, after a call from management, the Grievor advised his supervisors that he was not feeling well and retired to the mess room to take a break. Trainmasters McRobbie and Pattyn then joined the Grievor in the mess room during his break to inquire as to why he had to leave his assignment. McRobbie reports that Mr. AB told them that he was unable to continue working due to the managers' constant surveillance of him and others. The Grievor then stated he was stressed out and said he could not continue working on his assignment for the night. After discussing the issue with management, the Grievor booked sick and went home.

During his investigation, Mr. AB acquiesced that one of the reasons he felt stressed was because of the management's intervention during his shift:

> "Q18: Appendix A states that you told Trainmaster McRobbie that one of the reasons you felt unwell was because management had been observing your movements and, when you stopped, you were asked to explain the reasons for them and it made you feel kind of harassed. Is that correct?
>
> A18: Yes."

Mr. AB added that there were several factors involved:

> "Q21: In appendix A, Mr. McRobbie states that you were unable to continue working and finish your shift because of the stress and because you claimed to be unfit. Is that correct?

> A21: Yes, but there were several factors involved.
>
> Q22: The second-last paragraph of [Trainmaster McRobbie's memo] states that you were under a great deal of stress with management constantly monitoring you and could not continue working, and that, at the same time, you mentioned to Messrs. Pompizzi and McRobbie that you had other problems at home. Is that correct?
>
> A22: Yes, but I would like to point out that my personal problems were not keeping me from completing my shift, but rather that it was a combination of factors unrelated."

After review of the original statement, a supplemental investigation was scheduled to determine the number of times management contacted the Grievor on the 31st of March. The conclusion of the investigation was that the Grievor's assignment was contacted five times between 14:30 and 18:15. Four of those communications were instructions given over radio to the crew regarding its assignment, which is a normal practice.

The one time management communicated with the Grievor regarding work progress was after he received instructions to not add two cars and proceed with doubling the cuts of cars. Management noticed that, after receiving the communication, the crew was not moving and did not perform the ordered task. A supervisor then asked the Grievor why his assignment wasn't moving.

At the hearing, the Grievor explained that when he received the call to change a movement in his assignment, he began briefing his crew on the matter but that within a minute, management called him asking why his assignment was not moving yet. When Mr. AB answered that he was briefing his co-workers, he was told that locomotives "must

move". It is at this moment, Mr. AB explained, that he began to feel overwhelming stress and that he could not keep working anymore and was granted a five minute break.

During a second investigation, the Grievor alleged that the comment from the supervisor did not trigger his feelings of harassment or stress:

> "Q35: You mentioned to Mr. McRobbie that being observed and questioned about the fact that you were stopped made you feel as though you were being harassed, and the stress began to reach its breaking point. Was this caused by the conversation of 1734?
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> A: It was a combination of factors, but I don't think it was this comment that triggered it."

It is important to note that before the Grievor left the premises on the 31st, Superintendent Pompizzi required him to provide a doctor's note in order to return to work, to which the Grievor agreed. The next day, Mr. AB saw his family physician, Dr. Stumpf, who deemed him medically unfit from March 31st until April 10th because he suffered an anxiety attack.

After both investigations, the Company concluded that the Grievor's explanations for booking off sick were not credible and sufficient to justify his actions which delayed the work. As such, the Company decided to dismiss him on May 3rd, 2015. The Employer argues that the task that the Grievor was to do was simple in nature and that the supervisors' communication didn't justify the Grievor booking off in the middle of his shift. The Employer asserts that it applied progressive discipline and that, as such, it was justified to discharge Mr. AB.

The Union argues that the dismissal is unjust, unreasonable and excessive. It adds that it was done in contradiction to the *Canadian Labour Code* since the Grievor was sick and that it was the reason why he booked off. The Union also seeks punitive damages for the Company's violation of the *Canadian Human Rights Act*.

The evidence adduced clearly shows that Mr. AB felt ill on March 31st. Dr. Stumpf's note, which was not contested by the Employer, along with the Grievor's credible testimony during the hearing, support his explanation of suffering from an anxiety attack. Moreover, the Grievor's medical record shows that Mr. AB is indeed prone to anxiety which adds weight to this explanation.

It is apparent that the Grievor could not pinpoint the exact event or cause that triggered his anxiety attack on March 31st. However, that does not contradict the evidence showing that the Grievor did in fact suffer from such an anxiety attack and that, as a result, he became unfit for duty on the day in question.

Article 239(1) of the *Canadian Labour Code* states that:

> "239 (1) Subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if
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> (a) the employee has completed three consecutive months of continuous employment by the employer prior to the absence;
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> (b) the period of absence does not exceed 17 weeks; and
>
> (c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of

> time, and that that period of time coincides with the absence of the employee from work."

In the case *Canadian Pacific Railway* and *Teamsters Canada Rail Conference, Re*, arbitrator Kaplan stated that:

> "An employee being physically unfit for duty will report same to the crew management center, so that the employee may not be called. The employee will not be disciplined for booking unfit."[1] [Emphasis added]

In light of the evidence that was presented, I find that the Employer has violated article 239(1) of the *Canadian Labour Code.* The Employer should have taken into account the medical note provided by the Grievor's doctor, which indicated that he suffered from an anxiety attack and thus was unable to keep working afterwards. Had the Employer considered both Dr. Stumpf's diagnosis and the Grievor's medical record in its conclusions, the explanations given by the Grievor would have appeared coherent, especially considering his anxiety disorder and sensitivity to stress. It is important to remind that the medical note of the Grievor's doctor was not contested by the Employer.

As for the Union's request for punitive damage, a *prima facie* case for discrimination must first be established by the Union on the balance of probabilities[2]. However, I do not find that such a demonstration was made. Indeed, the Company has made a mistake by not taking into account the Grievor's medical note and record when it

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[1] 2012 CarswellNat 5473, para. 9
[2] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868; Canada (Minister of National Defence) v. Mongrain, [1992] 1 C.F. 472 (Canada's Federal Court of Appeal)

reached its conclusions, but that alone is not sufficient evidence to suggest that CP dismissed the Grievor because of his disability.

Thus, for the above-mentioned reasons, the grievance is allowed. The Grievor is to be reinstated in his position forthwith without loss of seniority and is to be compensated for all wages and benefits lost. I reserve jurisdiction for any difficulty that may arise from the application of this decision.

January 23, 2017

MAUREEN FLYNN
ARBITRATOR