CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4439

Heard in Toronto, January 14, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Ian McKenzie.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on October 17, 2014, Mr. McKenzie was dismissed from Company service for "For conduct unbecoming an employee of Canadian Pacific as evidenced by your repeated inappropriate and unacceptable behaviour and language towards OHS Coordinator Ms. Brenda Land during four telephone conversations on September 24th, 2014, in violation of the Company Policies, Discrimination and Harassment Policy 1300 and Violence in the Work Place Policy H & S 4340 and CROR General Rules A, item ix, while employed as a Trainperson based out of Winnipeg, MB."

The Union submits the Company has failed to properly recognise and oversee Mr. McKenzie's known medical condition, and its obligations regarding a duty to accommodate. As a result, the Union contends that the disciplinary action taken against Mr. McKenzie is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors surrounding the incident in addition to being in violation of the Canadian Human Rights Act.

The Union requests that the disciplinary action be removed in its entirety and that Mr. McKenzie be made whole for all associated loss. Alternatively, 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.) D. Fulton	**(SGD.)**
General Chairperson	

On behalf of the Company, the following appeared:

J. Bairaktaris	– Director, Labour Relations, Calgary

On behalf of the Union, the following appeared:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Senior Vice General Chairperson, Medicine Hat

R. Finnson – Vice General Chairperson, Wynard
M. Yanchuk – Local Chairman, Winnipeg
I. McKenzie – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

At the time of the incident on September 24, 2014, the Grievor had ten (10) years of pensionable service. Of those years, nine (9) were spent as a Running Trades employee (Yardman, Conductor and Locomotive Engineer) and one (1) year in the Maintenance of Way Department.

In May 2011, the Grievor's treating physician diagnosed him with alcoholism. On October 3, 2012, the Grievor signed an "EFAP and OHS Contract for Successful Treatment (Safety Critical/Sensitive Contract)". From 2012 through 2014, Mr. McKenzie was required at various times to submit to random substance screening tests. On each occasion, the OHS Coordinator contacted the Grievor to arrange for testing. At every test, from December 2012 through September 2, 2014, Mr. McKenzie tested negative for all substances. He also attended AA meetings and his treating physician continued to monitor the Grievor's substance abuse disorder.

The Employer stated that a second Relapse Prevention Agreement was signed in July 2013 and that it should be considered as a "Last Chance Agreement". The Union denied its existence and maintained that the Grievor did not sign any "Last Chance Agreement". The said contract was not produced at the hearing therefore I gather from the evidence that the Grievor had not signed, at the time of the incident, a " Last

Chance Agreement" but was nevertheless compelled to comply with a Relapse Prevention Agreement.

On September 24, 2014, at approximately 09:42, the OHS Coordinator, Ms. Brenda Land, contacted the Grievor to schedule a random test within the next 24 hours of the call. She could not understand the Grievor and asked that he call back. Within the next hour, three telephone conversations ensued. During those calls, the Grievor was angry, behaved in a bullying manner and used foul language. For instance, he stated, "What the fuck are you doing? Why are you harassing me? Don't I have anything better to do then fuck up his life? Fucking sick of me personally, I caused him to lose money that last time. I must fucking love this and better be careful". Ms. Land felt threatened, uncomfortable and emotionally upset and reported the incident the same day.

Mr. McKenzie attended the substance screening appointment on September 25 as directed by Ms. Land. He tested positive for cocaine and negative for all other substances.

During the Employer's investigation held on October 1, 2014, the Grievor admitted that his comments were inappropriate. He also explained that he was currently seeking help for ongoing personal issues and expressed regrets. Lastly, he offered to apologize to Ms. Land.

Upon a review of the material filed at the hearing, the Arbitrator concludes that Mr. McKenzie did engage in a conduct unbecoming an employee by virtue of verbal abuse and threats expressed towards Ms. Land.

While the Grievor's behaviour deserves disciplinary action, the only issue is the measure of penalty appropriate under the circumstances. Moreover, it is true that the Grievor's record was not without blemish at the time of the incident however the Grievor had never received any substantial disciplinary measures for similar misconduct, and it appears that the aforementioned incident represents an isolated and momentary outburst. The evidence also demonstrates a link between the Grievor's behaviour on September 24 and his drug (cocaine) taking or relapse.

A reading of the awards submitted by both parties reveals that arbitrators tend to downgrade the gravity of momentary flare-ups which are not too serious in nature, while holding the principle that a pattern of abusive or belligerent behaviour will not be tolerated and will ordinarily justify discharge, given that each case turn upon its own peculiar mix of facts.[1] Arbitrator MacDowell summarizes the mitigating factors that are considered in the determination of the appropriate measure in such matters as follows:

> **24** (…) Arbitrators have merely taken into account changing social mores and noted the importance of considering all of the factors of the situation, including those which may suggest that a lesser penalty could fairly accommodate the employer's concern with order, deterrence, and effective corrective discipline, and the employee's concern with his livelihood and job security.
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> **25** What is apparent from a perusal of these cases is that the use of profanity in the work place is not, in itself, grounds for discipline.

[1] See CROA&DR 1707; CROA&DR 3148; CROA&DR 3466.

> A factory floor is not a Sunday school. The reality of the work place is that vulgar language and pithy epithets are often an ordinary part of everyday conversation. It is not the words themselves but the tone and intention of the user which determine between profanities should be considered abusive or offensive. Moreover, there is a difference between a mere insult, a momentary outburst, and a course of conduct which represents a serious challenge to the authority of the employer and is incompatible with the continuance of a viable employment relationship. The gravity of the situation can vary substantially and so should the disciplinary response. Finally, an assessment of the surrounding circumstances may serve to mitigate, if not fully exculpate, the Grievor's offence. One must consider such matters as: the relationship of the individuals concerned (i.e, superior/subordinate or two rank-and-file employees); whether there was provocation; the presence or absence of a previous good disciplinary record; whether the incident appears to be part of a pattern of intemperate behaviour; the Grievor's seniority; whether there was an apology; etc.: see *Re Dominion Glass Co. and United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84 (Linden).[2]

In this case, the Arbitrator finds that under the circumstances, the dismissal was an excessive penalty. It was an isolated incident and the Grievor did express some remorse and offered to apologize to Ms. Land.

Concerning the Grievor's disciplinary record, the evidence shows that the Grievor had been disciplined mostly for his absenteeism as it relates to his substance abuse disorder and such disorder is recognized by the Courts as a disability under the *Canadian Human Rights Act.* The material before me reveals that with the exception of the single relapse that occurred on September 24, 2014, the Grievor has complied fully with the terms of the Relapse Prevention Agreement. Such efforts weigh in favour of the Grievor. However, the evidence reveals a link between his relapse and his attitude on

[2] Re Rolland Inc. and Canadian Paperworkers Union, Local 310, [1983] O.L.A.A. No 75, 12 L.A.C. (3d) 391.

September 24, 2014 and furthermore, the Grievor chose not provide during the investigation all the facts related to his outburst; he must therefore assume the financial consequences.

For the foregoing reasons, the Arbitrator allows the grievance in part and orders that the Grievor be reinstated into his position, without loss of seniority, without compensation for any wages or benefits lost, and that his disciplinary record stand at thirty-five (35) demerits. In addition, the Relapse Prevention Agreement in force at the time of the dismissal shall be extended until December 31, 2016.

February 3, 2016

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MAUREEN FLYNN

ARBITRATOR