IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY

(the "Employer")

AND:

CANADIAN AUTO WORKERS

(the "Union")

(Rudy Sperling Termination Grievance)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Paul Wajda for the Employer
	Brian McDonagh for the Union
HEARING:	December 20, 2005 New Westminster, BC
WRITTEN SUBMISSIONS:	January 31, 2006 and February 13, 2006
PUBLISHED:	April 25, 2006

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The parties agreed I was properly constituted as an arbitrator with jurisdiction under their Collective Agreement to hear and determine the matter in dispute.

The issue before me is a grievance filed by the Union alleging that the discipline of 30 demerits and 10 demerits issued against Engine Attendant Rudy Sperling was without cause and that his subsequent termination was therefore unjust. The Union is requesting that the grievor be reinstated without loss of seniority and with full redress for all lost wages and benefits.

BACKGROUND

The parties were unable to agree on a "Statement of Fact & Issue" so each presented their own *ex parte* statement. The two statements do not differ with regard to the statement of fact, which is set out as follows:

> The grievor is 42 years of age and began work for the Employer on August 9, 1989. He has just over eight years of Cumulative Company service owing to an extended absence from work from January 1998 to April 2003 as a result of an occupational injury. Prior to the incidents in question, Mr. Sperling had a total of 49 demerits relating to seven prior incidents from 1990 to 2005.

The grievor was disciplined for two separate incidents that occurred in May of 2005. The first occurred on May 22, 2005, when the grievor was working as a ground man, assisting another employee, Mr. Init, in moving a

three unit consist. From the investigation of the incident, it is clear that the grievor was solely responsible for this point of movement and did not properly align the OSLE switch to track #3. The result was that the locomotive entered the strop track, colliding with a stationary locomotive, CP9546, resulting in approximately $1,672.94 of damage to the two locomotives.

During the formal investigation, the grievor acknowledged "a mistake" and took full responsibility for the incident. The Company restricted him to custodial duties and issued the 30 demerits discipline on June 17, 2005.

The second incident took place while Mr. Sperling was on custodial duties on May 30, 2005. On that date the grievor was operating a truck, which he drove over a crossing making contact with a switch stand causing a dent in the right rear of the truck box and damage to the switch stand handle. During the formal investigation of this incident, Mr. Sperling acknowledged that he must have cut the corner a little to close. The damage was estimated to be approximately $700.00 to the truck and $20.00 to the switch.

The grievor received 10 demerits for this incident in addition to the 30 demerits he received for the previous incident, bringing his accumulated total under the *Brown System* of discipline to 89 demerits. This resulted in his dismissal.

POSITIONS OF THE PARTIES

The Employer takes the position that the discipline meted out to the grievor was appropriate given the circumstances and the prior disciplinary record of Mr. Sperling.

Counsel for the Employer, Mr. Wajda, submits that the movement of a locomotive within the Mechanical Shop Track environment requires certified and qualified Engine Attendants to strictly adhere to all Company rules, regulations and policies to ensure the safety of all employees and avoid damage to equipment and property.

The Employer asserts that Engine Attendant positions are deemed as "safety sensitive", which is mandated by the Rail Transport Commission of the federal government and, as such, the grievor was certified on the Shop Track Operations Curriculum program. He was most recently re-certified in August, 2004.

Counsel submits that it treated the grievor no differently than any other employee involved in similar incidents. Coupled with the grievor's record of previous on-track incidents, the Employer argues that the grievor's discipline and discharge were justified in the circumstances. The Employer relies on *Canadian National Railway and CCROU*, CROA 3000 (Picher) and *Canadian National Railway and CCROU,* CROA 2936 (Picher) to support its position.

Counsel argues that there is no doubt the discipline of 30 demerits was appropriate in a case where an employee fails to properly line up the switch and observe the switch points resulting in a locomotive accident. Similarly, the 10 demerits for the damage to the Company vehicle and switch stand are justified, in the submission of Counsel for the Employer, given that the grievor was responsible for the damage due to undue care and attention. The Employer relies on *Canadian Pacific Railway and CAW, Local 101*, SHP 580, (Picher) and *Canadian Pacific Express and BRAC*, CROS 976 (Weatherill) to support its position.

Counsel for the Employer contends that Mr. Sperling should have known, given his 49 demerits at the time, that further incidents relating to inattention and carelessness would result in an assessment of discipline. Mr. Wajda takes the position that the Employer is frustrated with respect to the ongoing incidents with the grievor to the point that it is concerned for his safety and the safety of others.

The Employer rejects the notion put forward by the Union that it should assign the grievor to alternate duties, arguing that this is a disciplinary matter not an issue of accommodation. Put another way, it is the position of the Employer that when an employee fails to follow the procedures in place to protect themselves, equipment and other employees the proper response is discipline.

The Employer also rejects the Union's attempt to correlate the incidents in question with overtime worked by the grievor. Counsel contends there is no foundation for this contention, it was never raised during the investigations, nor was it raised in the grievance procedure. Further, the Employer submits that the grievor was not forced to work overtime and was able to refuse to work overtime if he felt it was impacting his ability to perform his duties safely. The grievor is totally responsible to ensure his fitness to work when accepting a call, argues Mr. Wajda, particularly in a safety sensitive position. The Employer says this responsibility exists under the *Canada Labour Code*, at Section 126.1:

> While at work, every employee shall;
>
> (c) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;
>
> (g) report to the employer any thing on circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or other persons granted access to the work place by the employer;
>
> (j) report to the employer any situation that the employee believes to be a contravention of this part by the employer, another employee or any other person.

In response to the Union's allegations of a failure to accommodate the grievor, the Employer's initial submission was that the grievor returned to work in 2003 following a workplace accident, was deemed fully fit to perform his duties and did in fact resume his duties without any complaint or indication he could not do so as a result of his injury. Further, Counsel argues that the grievor has never requested accommodation since his return to work in 2003, nor was any need to accommodate the grievor brought to the Employer's attention.

Finally, the Employer submits that the two incidents can be considered a culminating incident based on the grievor's prior record. Counsel relies on *Canadian Pacific Railway and CAW*, SHP 480 (Picher) to support this argument.

In conclusion, it is the Employer's position that progressive discipline was not working and the Employer sees no other course of action but to assign demerits to the grievor. Counsel submits that this disciplinary response was in fact appropriate given all of the circumstances, including the grievor's record, and, based on that, his subsequent dismissal for accumulation of demerits under the *Brown System* of discipline was justified.

For its part, the Union takes the position that the Employer allowed the grievor to work excessive amounts of overtime, in violation of the *Canada*

Labour Code Part II, Section 124(1) and Part III, Section 171(1), which contributed to the accidents in question. The provisions of the *Canada Labour Code* that govern hours of work as they relate to the case at hand are as follows:

> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected….
>
> 171. (1) An Employee may be employed in excess of the standard hours of work but, subject to section 172, 176, and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as nay be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed….
>
> 172. (1) An employer may, in respect of employees subject to a collective agreement, establish, modify or cancel a work schedule under which the hours exceed the maximum set out in section 171 or in regulations made under section 175 if
>
> (a) the average hours of work for a period of two or more weeks does not exceed forty-eight hours a week; and
>
> (b) the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union….
>
> 176. (1) On the application of an employer or an employer's organization, the Minister, having regard to the conditions of employment in only industrial establishment and the welfare of the employees, may, by a permit in writing, authorize hours to be worked by any class of employees therein in excess of the

> maximum hours of work specified in or prescribed under section 171, established pursuant to section 172 or prescribed by regulation made under section 175.
>
> (2) No permit may be issued under subsection (1) unless the applicant has satisfied the Minister
>
> (a) that there are exceptional circumstances to justify the working of additional hours;
>
> (b) that the employer had posted a notice of the application for a permit under subsection (1), for at least thirty days before its proposed effective date, in places readily accessible to the affected class of employees where they were likely to see it; and
>
> (c) if those employees are represented by a trade union, that the employer had informed the trade union in writing of the application for the permit.

Counsel for the Union, Mr. McDonagh submits that, in the year prior to the two mishaps that led to his dismissal, the grievor worked 2200 hours of overtime, or approximately 39.3 hours per week. Counsel argues that this is in excess of the maximum limit under the *Code*, without a permit from the Minister or agreement from the Union to changes in work schedule as required by Section 172(1)(b). Given the two successive accidents, it is obvious that the Employer did not ensure the health and safety of the grievor, in the submission of the Union. Counsel argues that it is reasonable to adduce that Mr. Sperling would have been fatigued from having worked such extreme amounts of

overtime and he would not have been as alert as he could have been on the days in question.

Counsel further contends that the Employer violated Rule 44.1 of the Collective Agreement in allowing the grievor to work excessive overtime. Rule 44.1 reads:

> 44.1 The Company shall institute and maintain all precautions to guarantee every employee a safe and healthy workplace and to protect the environment. The Company shall comply in a timely manner with the Canada Labour Code, Part II, its regulations, codes of practice, and guidelines and all relevant environmental laws, regulations, code of practice and guidelines. All standards established under these laws shall constitute minimum acceptable practice to be improved upon by agreement of the Joint Health, Safety and Environment Committee which shall be known throughout the following articles as the "Committee".

The Union also takes the position that the Employer did not accommodate the grievor to the point of undue hardship and could have assigned him to alternate duties instead of disciplining and dismissing him. Mr. McDonagh submits that that Employer has long known that the grievor has had a permanent disability since he was a child in the form of a disease affecting his arm and leg on one side of his body.

In the submission of the Union, due to the grievor's efforts to not allow his disability to interfere with his duties he has not needed to be accommodated in the past. However, Mr. McDonagh argues that, knowing the grievor had a disability, the Employer should have taken into consideration the fact that his disability could be directly affected by fatigue caused by working excessive overtime.

The Union argues that the Employer did not consider the grievor's disability at all. Counsel submits the following case law to support its position that the Employer has discriminated against the grievor by ignoring his disability and disciplining him: *Re Quebec (Commission Des Droits De La Personne Et Des Droits De La Jeunesse) v. Montreal (City)*, [2000] 1 S.C.R. 665; *Re Grismer v. British Columbia (A.G.)*, [1999] 3 S.C.R. 868; and *British Columbia (PSERC) v. British Columbia Government and Service Employee's Union*, [1999] 3 S.C.R.3 (the "Meiorin Case"). In addition, the Union argues that the Employer has violated Rule 17 of the Collective Agreement, which requires it to accommodate disabled employees.

Finally, the Union takes the position that the Employer has not established wrongdoing on the grievor's behalf sufficient to give it cause to discipline him. Specifically, the Union relies on *Re Board of School Trustees of School District No. 57 (Prince George) and United Brotherhood of Carpenters & Joiners, Local 2106*, 34 L.A.C. (3rd) 228 BC J.E. (Dorsey), June 3, 1988 to

support its position that the Company cannot punish an employee for having an accident. Counsel submits that there is no evidence to support that the incidents in question were anything more than unfortunate accidents; that there was no intent or willfulness involved; and given his state of fatigue, it cannot be said there was a lack of care. Further, with respect to the second incident, on May 30, 2005, it appears that the grievor was disciplined solely for damaging a piece of Company equipment and it is the position of the Union that discipline cannot be meted out solely for this reason without evidence of an infraction of a rule on policy.

In summary, the Union argues that the discipline of 30 demerits and 10 demerits be removed from Mr. Sperling's record and that he be returned to duty without loss of seniority and with full redress.

OBJECTION TO NEW ISSUES/EVIDENCE

At the hearing, the Employer objected to the Union taking the position that the grievor was discriminated against and the Company failed to accommodate him under the terms of the Collective Agreement and Canada Human Rights Code. Specifically, Counsel for the Employer takes issue with the Union's attempt to introduce medical evidence with respect to Mr. Sperling's purported disabilities for the purpose of establishing that they contributed to the incidents in question and to establish that the grievor should have been accommodated rather than disciplined.

At the hearing, the parties agreed to submit their respective positions on this issue in writing.

In its January 31, 2006 submission, the Employer argues that the accommodation issue and evidence had not been raised by the Union prior to the arbitration hearing. On that basis Mr. Wajda argues that the Union should not be allowed to introduce the evidence in question.

It is the position of the Employer that to allow the Union to introduce the evidence in question would result in serious prejudice to the Company and would violate the spirit of the Collective Agreement. Counsel contends that it is significant that the grievor has never raised his disabilities with CP Rail, nor has he ever asked for a workplace accommodation as a result of his disabilities. Further, Mr. Wajda submits that at no point during the investigations of the incidents did the grievor raise the issue of a physical or mental disability.

The Employer submits that the case law in the rail industry recognizes a "practical need" the kind of arbitration process that currently exists. Counsel relies on *Canadian Pacific Railway Company and CAW, Local 101*, SHP 519, where the following principle is outlined at page 4:

> It is in the interest of both parties to come to the arbitration hearing with a <u>clear, well-defined</u>

> understanding of the scope of the dispute and issues which will be the subject of the hearing.
>
> (emphasis added)

Mr. Wajda submits that there cannot be a "clear, will-defined understanding" of a dispute where one party relies on information that the other party has had no previous access to and no opportunity to assess. Counsel contends that if the grievor's purported disabilities were in fact a central contributor to the incidents in question, the Union should have raised it in the initial grievance or at any time during the process thereafter. The Company further relies on *Canadian Pacific Railway Company (Mechanical Services) and CAW, Local 101*, SHP 588 to support its contention that the Union cannot "surprise" it at the arbitration hearing and must allow the Employer an opportunity to properly prepare for arbitration.

In the alternative, if the Union is allowed to rely on the medical evidence, the Employer argues the evidence is not relevant to the circumstances surrounding the grievor's dismissal. Specifically, the Employer contends that there is nothing in information the Union has put forward that offers any objective medical information supporting the position that an underlying impairment led to the incidents in question. To the contrary, Counsel submits that there is evidence of normal brain functioning and a normal mental status examination by a neurologist. Simply put, the Employer does not accept that a

mental and/or physical disability contributed to the actions that led to the grievor's dismissal.

In its submission of February 13, 2006, the Union takes issue with the Employer's reliance on the "CROA" arbitration procedure, as it is not a member of the Canadian Railway Office of Arbitration. The Union acknowledges that it utilizes essentially the same procedure, however, this is only because it is comfortable with it and, by doing so it is not precluded from proceeding to arbitration in the traditional manner. The Union points to Rule 29.4 of the Collective Agreement, which requires:

> 29.4 A Joint Statement of Issue containing the facts of the dispute and reference to the specific provision or provisions of the Collective Agreement where it is alleged that the agreement has been v violated, shall be jointly submitted to the Arbitrator at least thirty (30) days in advance of the date of the hearing. In the event the parties cannot agree upon such Joint Statement of Issue, each party shall submit a separate statement to the Arbitrator at least thirty (30) days in advance of the date of the hearing and at the same time provide a copy of such statement to the other party.

The Union contends that it met the requirements of Rule 29.4 as it identified the disability/accommodation issue in its statement which was forwarded to the Employer on November 18, 2005, more than one month prior to the hearing.

Counsel contends that for the Employer to now suggest they were surprised by the Union's assertion at the hearing is simply not correct. Mr. McDonagh argues that simply because the Employer chose not to counter the Union's argument, it cannot now argue that the arbitrator should let it "sidestep" the matter with a claim of surprise.

In sum, the Union submits that the medical evidence it presented was rightly introduced and that Mr. Sperling does indeed have physical and mental disabilities that were known to the Employer for years. Further, the Union argues that there was no prejudice to the Employer and the grievor was available at the hearing for cross examination if Counsel for the Company had so wished. The Union contends that the Employer had every opportunity to make its case and objects vehemently to any suggestion that further hearings into this matter need to be held.

DECISION

Dealing first with the issue of the discipline for the two accidents, I am satisfied that, in the normal course, discipline was warranted in these circumstances. There is no dispute that the two accidents occurred and, further, the grievor was, by his own admission during the investigations, responsible for both the movement of the locomotives on May 22 and the operation of the Company truck on May 30. In the second instance,

particularly given the grievor's past record, an assessment of 10 demerits is well within the range for such an accident, as noted by Arbitrator Picher in SHP 580:

> Suffice it to say, the evidence leaves no doubt but that the grievor did not exert the degree of care and attention which he owed to the Company in the operation of its vehicle on Company premises…The irrefutable fact is that the grievor demonstrated carelessness in the operation of the Company's vehicle resulting in irreparable damage to two tires on the inspection truck.
>
> Was the assessment of ten demerits appropriate in the circumstances? In addressing that question regard must be had to the grievor's prior disciplinary record. Remarkably, the record before the Arbitrator confirms that on three previous occasions the grievor was disciplined for the unsafe operation of a Company vehicle…The material before the Arbitrator confirms that the assessment of ten demerits has been applied to other employees involved in vehicle accidents resulting in damage to Company equipment. On the whole I am satisfied that ten demerits was well within the appropriate range of discipline, and that the Company's decision in that regard should not be disturbed.

Given the magnitude of the first accident and the damage caused to two Company locomotives, I similarly do not find that the Employer's issuing 30 demerits was an excessive response in all the circumstances.

Furthermore, I accept the Employer's argument that the May 30 incident served as a culminating incident so as to not only warrant the 10 demerits, but

also a review of the grievor's record and previous demerits, thus resulting in his termination from employment at the railway.

The Union makes an argument that the Employer should bear some responsibility for the incidents in question given the excessive amounts of overtime worked by the grievor. While I am somewhat alarmed by the amount of overtime worked by the grievor over the past two years, the matter before me is not the grievor's overtime, but rather his discipline and ultimately his dismissal. Based on the facts before me, the Union did not provide evidence that there was any causal connection between overtime and either incident in question.

As such, absent a finding of discrimination and a failure to accommodate the grievor's disability, I find that the Employer acted reasonably in its discipline of the grievor and properly applied the *Brown System* in terminating Mr. Sperling's employment.

With respect to the Union's argument regarding the Employer's failure to accommodate, I find that the evidence and argument put forward by the Union to be admissible in these proceedings for the following reasons.

First, I concur with Arbitrator Picher that there is a practicality in the procedure for arbitration in place between the parties and that "there is no

room for surprise in such a system". However, with respect to the issue in question, I am satisfied that the Employer was not prejudiced in the case at hand. The issue of the grievor's disability can come as no surprise to the Employer. It has been party to matters in the past in this regard, specifically, in a previous Workers' Compensation claim that resulted in a WCAT award (July 19, 2001), which states as follows:

> The worker had encephalitis as a child, which left him with a turned in right foot…
>
> Dr. B said the encephalitis had left the worker with spastic diplegia in his right hand, leg and foot, a neurological condition that cause his foot to turn in. He had an Achilles tendon release in childhood, but the ankle remained weak…

There are further medical reports throughout 1990 to present, indicating that the grievor has undergone treatment and rehabilitation with respect to this disability, both in conjunction with as well as outside his extended absence from 1998-2003. In other words, the Union has presented ample evidence of a pre-existing and ongoing medical condition and I am satisfied that the Company was aware of this condition.

Second, the Union clearly raised the issue of the grievor's disability in its *ex parte* Statement of Fact & Issue, as follows:

> …in violation of the Canada Human Rights Code, its Regulations and Practices, the Company could have assigned Engine Attendant Rudy Sperling, a long service disabled employee, to alternate duties instead of disciplining and dismissing him;

From the Employer's initial submissions at the hearing, I understand that the Company did not fully understand the extent of the Union's submission. However, it cannot be said that the issue was not raised prior to the hearing pursuant the requirements of the Collective Agreement. In *SHP 588, supra*, the arbitrator notes:

> It is well established that a board of arbitration should not be unduly technical in limiting the ability of the parties to deal with the true substance of the matter which gives rise to a dispute at arbitration, particularly where there is no demonstrated prejudice to the opposite party. I am satisfied that that is the case here, as regards the content of the Union's ex parte statement of issue. The Union did not deviate in the object of its grievance…

As noted above, the same can be said in this case. Clearly the matter of "accommodation" of the grievor's disability was an issue that the Union considered relevant to this matter and, with respect to the submissions of Counsel for the Employer to the contrary, they ought to be considered. It would be, in my view, unduly technical and would prevent me from getting to the real substance of this dispute if I were to exclude the evidence in question at this stage of the proceedings.

Turning now to the issue itself – the accommodation of the grievor's disability – I have already noted that he indeed has a disability within the meaning of that term under the relevant legislation and the Collective Agreement. The Union argues that, having established the existence of a disability, the duty to accommodate applies, as set out in the case law. The test established by the Courts requires that an individual with a disability be accommodated to the point where it would be impossible to do so without encountering undue hardship. However, before arriving at that point in this case, the Union must "establish that the standard is prima facie discriminatory". In my view, a prima facie case of discrimination has not been established.

The evidence before me suggests that the Employer did not even turn its mind to the issue of accommodation of the grievor's disability in its application of the demerits and ultimately the dismissal of the grievor. The Employer submits that it did not do so because the grievor's disability was in no way a factor in the events in question. I agree and would simply add that neither is there evidence to suggest that the discipline meted out to Mr. Sperling and the application of the *Brown System* of discipline in this case discriminated or served to discriminate against the grievor because of his disability.

The Union contends that the grievor's disability, coupled with excessive overtime, created a situation where he was less alert than he would normally be, resulting in the two incidents in question. Other than this assertion by Mr. McDonagh, there is nothing before me to suggest any connection between the grievor's disability and the two accidents. To the contrary, looking at the transcript of the investigations into the two accidents, it is clear that the grievor was culpable and acknowledged as much. With respect to the first accident, the transcript reads, in part:

> Q: 37 Could you please explain how it is you had lined up the DSLE switch incorrectly?
>
> A: I can't, I made a mistake.
>
> Q: 38 At the time of the incident did you have any physical or personal reasons that may have contributed to this incident?
>
> A: No, none that I can think of.
>
> Q: 39 In future will you ensure all correct procedures are followed for Switch's, 4-8, Personal Protective Equipment and Safety Procedure, Safety Precautions: Lining and Locking A Switch as stated in the STOC?
>
> A: Yes.
>
> Q: 40 How do you feel this incident could have been prevented?
>
> A: If I had double-checked the switch prior to the movement.

The transcript for the investigation into the second accident reads, in part:

> Q: 25 At the time of the incident did you have any physical or personal reasons that may have contributed to this incident?
>
> A: No.
>
> Q: 26 Were you aware of the position of the X switch prior to contacting it?
>
> A: Yes.
>
> Q: 27 Could you please explain then how this accident could have occurred.
>
> A: As the switch is located close the crossing where I turned I must have cut the corner a little close contacting the handle.
>
> Q: 28 Did you know the switch was located close to the crossing prior to the incident?
>
> A: Yes.
>
> Q: 29 In your opinion how could this damage have been prevented?
>
> A: If I had made a wider turn I feel the incident could have been prevented.
>
> Q: 30 In the future will you be more careful while operating company Vehicles?
>
> A: Yes.

As already stated, it is my finding that the Union has not made out a prima facie case of discrimination. The evidence is, simply, that the grievor did

not follow the proper procedures for the DSLE switch in the first instance, and "cut the corner a little close" in the second, resulting in damage to Company property in both cases. He was disciplined for each incident and, under the *Brown System* his accumulation of demerits resulted in termination. As such, the grievance is dismissed and the discipline and discharge of Engine Attendant Rudy Sperling stands.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 25th day of April, 2006.

Vincent L. Ready

Vincent L. Ready